

1991

## Inessentially Speaking (Is There Politics after Postmodernism?) [Book Review of Making All the Difference, by Martha Minow]

Allan C. Hutchinson

*Osgoode Hall Law School of York University*, [ahutchinson@osgoode.yorku.ca](mailto:ahutchinson@osgoode.yorku.ca)

### Source Publication:

Michigan Law Review. Volume 89, Number 6 (1991), p. 1549-1573.

Follow this and additional works at: [https://digitalcommons.osgoode.yorku.ca/scholarly\\_works](https://digitalcommons.osgoode.yorku.ca/scholarly_works)



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

---

### Recommended Citation

Hutchinson, Allan C. "Inessentially Speaking (Is There Politics after Postmodernism?) [Book Review of Making All the Difference, by Martha Minow]." *Michigan Law Review* 89.6 (1991): 1549-1573.

This Book Review is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

# INESSENTIALLY SPEAKING (IS THERE POLITICS AFTER POSTMODERNISM?)

Allan C. Hutchinson\*

MAKING ALL THE DIFFERENCE. By *Martha Minow*. Ithaca: Cornell University Press. 1990. Pp. xii, 403. \$29.95.

Although we need to use gender-related ideas in order to challenge gender constraints, we will only be able to accomplish that objective by constantly re-examining the ideas we are using. Ultimately, in order to challenge gender constraints effectively, our use of gender-related ideas must change with our shifting cultural context and the changes within ourselves. Only by continually re-thinking who we are and why we are making the choices we make can we free ourselves from the belief that our selves are constructed by our sexual identities.

— Mary Joe Frug<sup>1</sup>

Twilight is upon us. As the contemporary continuance of the Enlightenment project, modernity has had its day. Its erstwhile champions' efforts to establish a combination of authenticity and authority as the ground for Truth and Justice — that individuals can only give meaning and value to their own lives by locating and expressing their own self-identity — have proved to be misplaced. A modernist deliverance from doubt and uncertainty remains a tantalizing, but receding prospect. The sun of Truth is unfailingly hazy and in danger of total eclipse, resembling more a fading battery of artful floodlights. Everything loses its iridescence and is reduced to a dull pastiche of bland on bland. In a way of speaking, Minerva's owl has flown the philosophical coop entirely.<sup>2</sup> No longer taking its crepuscular flights of fancy, Wisdom's bird has abandoned Western attempts to locate a fixed

---

\* Osgoode Hall Law School, York University, Toronto. LL.B. (Hons.) (1974), London University; LL.M. Manchester (1978). —Ed. I am grateful to Brenda Cossman, Lisa Fishbayn, Blair Holder, Carol Smart, and Mark Warner for sharing their work and their insights with me.

1. Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065, 1140 (1985). In her life and in her writings, Mary Joe Frug represented the rigorous practice and the exhilarating promise of postmodernism. As part of the feminist project of challenging the extensive and complicated network of sociocultural practices that legitimate the subordination of women, she paid constant attention to the gendered and situated power of discourse. Always with genuine warmth and humor, she refused to accept the imperialistic claims of many radical scholars and resisted the easy politicking of modernism. M. Frug, *Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law*, 21 (Mar. 31, 1989) (unpublished manuscript). In her personal and professional life, she demonstrated that, far from being depolitical, postmodernism is the best and most effective way to be political. It is to her happy memory and joyful example that this essay is dedicated.

2. See G. HEGEL, *PHILOSOPHY OF RIGHT* 1-13 (T. Knox trans. 1945).

flightpath by which to understand and guide human experience. Knowledge seems to be only the fleeting trace of the will to power and understanding is irretrievably in cahoots with oppression. As its joyless archaeologist, Michel Foucault has written Enlightenment's fitting epitaph: "knowledge is not made for understanding; it is made for cutting."<sup>3</sup>

## I. THE POSTMODERN PUZZLE

For many observers, this modernist failure marks the beginning of the end. With much anguish, it is lamented that humanity is fast going to an existential hell in a nihilistic handcart. However, a strong band of critical scholars has resisted that apocalyptic appraisal. These scholars have sought to seize this particular moment by turning modernism's dusk into postmodernism's dawn: it is an opening and not a closing of opportunities. Recognizing that critical success has its own limitations and responsibilities, they resist the temptation to reach for higher ground than their own theoretical challenges permit. As the obituarists of Truth and Grand Theory, they are scrupulous to ensure that any efforts at normative reconstruction do not transgress the imperatives of deconstructive criticism, whose critical force they must respect. Deconstruction is an unforgiving and remorseless taskmaster.<sup>4</sup>

For all its deconstructive verve, postmodernism is alleged not only to render the practice of reconstructive politics difficult, but to sabotage any coherent program of progressive politics. Deconstruction undercuts politics and politics marginalizes deconstruction. Nevertheless, I intend to argue that there is no contradiction between a continuing loyalty to a postmodern strategy and the practical realization of a radical political agenda.<sup>5</sup> The postmodern challenge is to open a space for a *modus vivendi* that is neither misguidedly essentialist in theory nor hopelessly historicist in practice. In short, I claim that a postmodern approach to law is both textually viable and politically radical; it is not oxymoronic or naive to be both postmodern and progressive. Postmodernism is not the ground for a progressive politics, but a complementary strategy for one.

In the jurisprudential corner of postmodern scholarship, the work

---

3. M. Foucault, *Language, Counter-Memory, Practice* 154 (D. Bouchard ed. 1977).

4. See A. Hutchinson, *Working the Seam: Truth, Justice and the Foucault Way*, in *DWELLING ON THE THRESHOLD: CRITICAL ESSAYS ON MODERN LEGAL THOUGHT* 261-94 (1988).

5. See Binder, *Radicalism Deconstructed*, 69 TEXAS L. REV. (forthcoming 1991); Hunt, *The Big Fear: Law Confronts Postmodernism*, 35 MCGILL L.J. 507 (1990). Of course, postmodernism is far from the monolithic tendency that I have suggested. Although its protagonists share a general orientation, it is a fluid and protean line of critique and politics. See *infra* notes 9-12, 25-37 and accompanying text.

of Martha Minow deserves especial attention. Her *Making All The Difference* offers an excellent occasion for working through the puzzles and strategies of postmodern politics. Infused with a postmodern perspective, her writing stands at the frontiers of modern legal thinking in its efforts to reject and move beyond the modernist project of jurisprudence. In its searching analysis and imaginative proposals, *Making All the Difference* is a book to be reckoned with — it makes a difference. This review sketches the postmodern problematic, and canvasses Minow's engagement with the dilemma of difference. Addressing her treatment of power, the review then offers the outline of a postmodern politics and traces its implications for legal activity. The conclusion points to the difficulty of all that has gone before and places it in parentheses.

## II. IMPERIAL INTIMATIONS

through they're own words / they will be exposed  
they've got a severe case of / the emperors new clothes.

— Sinéad O'Connor<sup>6</sup>

Hans Christian Andersen's fairy tale of *The Emperor's New Clothes* has done stalwart work for deconstructive critics of jurisprudential pretension and legal obfuscation.<sup>7</sup> It is a beguiling fable of common credulity, scholarly complicity, and innocent exposure. Like the law, the emperor is only sustained in his majesty by the willingness of his subjects to suspend their common sense and to see what they were expected to see. With the innocent clarity of a child, the critic informs the gullible people that the emperor is naked. Exposed but undaunted, the emperor/law "walked even more proudly and the two gentleman of the imperial bedchamber[lawyers] went on carrying the train that wasn't there."<sup>8</sup> Consequently, despite the ingenuity of the juristic couturiers of right, law stands debagged and debunked in its bare essentials of might. It is a tale intended to chastise the conspiratorial and congratulate the contumacious.

But, on the insistence of the postmodernist impulse, the time has come to abandon Andersen's tale as a critical trope. Like most metaphors, its telling begins in openness and its denouement ends in closure. As context changes, its critical message reveals more about the critics than about those being criticized. The tale lends itself too easily to the interpretive ministrations of the modernists. It suggests that, once the wardrobe of conventional costume is dispensed with, power

6. O'Connor, *The Emperor's New Clothes*, I DO NOT WANT WHAT I HAVEN'T GOT (Ensign Chrysalis Records 1990).

7. See, for example, D'Amato, *Can Any Legal Theory Constrain Any Legal Decision?*, 43 U. MIAMI L. REV. 513, 536-38 (1989).

8. H. ANDERSEN, *The Emperor's New Clothes*, in *THE COMPLETE FAIRY TALES AND STORIES* 81 (E. Haugaard trans. 1974).

and people will be viewed and understood in their unadorned reality: all will be free to speak truth to the world and to apprehend the true nature of things. For the modernist, knowledge is available and ascertainable, but only outside and independent of power's corrupting influence. Behind or underneath the skewed truths and perceived realities of historical living lie the Truth and Reality of Life. The tale's modernist appropriation moralizes in terms of ontological retrieval and political reclamation; it is about finding ourselves rather than remaking ourselves.

In contrast to the modernists' preoccupation with essences and essentials, the postmodern temper has no eternal truth to offer and no immutable knowledge to dispense; it accepts the historically situated and socially constructed character of truths and knowledges. It does not seek to apprehend a fixed and given at-oneness, but to encourage a contingent complex of multiple realities.<sup>9</sup> By denying the possibility of a perfectible meta-narrative or a totalizing intelligibility, it concedes the existence of neither eternal difference nor everlasting undifferentiation and puts everything into perpetual parentheses. As such, postmodernism is a dynamic thesaurus of experiential values, not a technical manual of scientific methodology; difference is evanescent and mobile.<sup>10</sup> It is a rigorous and uncompromising discourse of nonessentialism that offers no grand theory of emancipation. There are many narratives, but no meta-narrative. Postmodernism simply dares people to walk the highwire of life without a metaphysical safety net for the occasional loss of balance or nerve.

As such, the naked body of the emperor is one more construction to be deconstructed and law is one more conjunction of power and knowledge to be explored. Neither the human nor legal body will ever present itself for inspection in its unmediated self-presence; there is no lost presence to be restored and no lasting judgment of the past in the name of a present truth. The political gaze fixes the body *as* body and law *as* law. For the postmodern critic, power both produces and is produced by knowledge. Knowledge, in turn, enables the claim to truth to be made that legitimates that same power and knowledge. Truth is always and already situated within the contexts of power and knowledge that it claims to validate.<sup>11</sup> All strategies are risky and all consequences are unpredictable: everything will depend on the informing context and precise timing of any particular intervention. '

---

9. See Coombe, *Room for Manoeuvre: Toward a Theory of Practice in Critical Legal Studies*, 14 LAW & SOC. INQUIRY 69 (1989); Fraser & Nicholson, *Social Criticism without Philosophy: An Encounter between Feminism and Postmodernism*, in FEMINISM/POSTMODERNISM 19-38 (L. Nicholson ed. 1990).

10. See D. FUSS, *ESSENTIALLY SPEAKING: FEMINISM, NATURE & DIFFERENCE* (1989).

11. See A. HUTCHINSON, *supra* note 4, at 261-94; Smart, *Law's Power, The Sexed Body, and Feminist Discourse*, 17 J.L. & SOC. 194 (1990).

The challenge, therefore, for postmodern jurists is to ensure that they do not march on another long day's journey into night. As well as guarding against postmodernism becoming its own meta-narrative, they must effect a viable practical posture that allows them to accommodate and respond to the double bind in which their theoretical affiliations place them. Nothing is outside history and change: everything is constructed and contestable, including and especially politics. The postmodern insight undermines monolithic and stultifying claims to authority and truth derived from a universal reason and opens up a space for transformative action. While it does not provide any blueprint for change or enlightenment, it does allow individuals to decide what world and what "me" they wish to make or remake based on experiential truths: postmodernism allows them to empower and affirm their proclaimed selfness with value and legitimacy. In postmodern parlance, critics must strive to be responsible strangers in their own native land. While "we can pronounce not a single destructive proposition which has not already had to slip into the form, the logic, and the implicit postulations of precisely what it seeks to contest[,] we cannot give up this complicity without also giving up the critique we are directing against this complicity."<sup>12</sup>

In charting the sustaining and contested interrelationships of truth, power, and knowledge, the question of politics is always insinuated and implicated. Any analytical devices used to understand or evaluate history are themselves always and already part of that politics. Caught within this fundamental triangulation, those hostile to postmodernism insist that it is caught between a rock and a hard place in its efforts to sustain and sanction a progressive practice of transformative politics. It is argued that the Critics either must abandon the deconstructive method that blunts the progressive edge of their political program and fall back on a variant of the discredited formalism,<sup>13</sup> or they must forsake the radical political agenda that cramps their deconstructive verve and resign themselves to a reluctant stance of political quietism.<sup>14</sup> Consequently, despite their radical protestations, postmodernists' deconstructive efforts are dismissed as futile and reactionary because they "cannot help but bring comfort, energy, and ideas to the enemy of change."<sup>15</sup>

The long and short of it, to listen to the detractors, is that the postmodernists' attachment to a deconstructive mode of critique is in-

---

12. J. DERRIDA, *WRITING AND DIFFERENCE* 280-81 (A. Bass trans. 1978).

13. See Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990).

14. See generally F. KERMODE, *AN APPETITE FOR POETRY* (1989); Hunt, *supra* note 5.

15. F. LENTRICCHIA, *ARIEL AND THE POLICE* 131 (1988). For similar charges of deconstruction's conservatism, see T. EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 132 (1983); J. HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY* (F. Lawrence trans. 1987); E. SAID, *THE WORLD, THE TEXT, AND THE CRITIC* 193, 242-43 (1983).

compatible with their reconstructive aspiration to a truly progressive program of transformative politics — if everything is always open to interpretation, how do we know what is and is not progressive? By proceeding on their campaign of critical terrorism and razing all textual strategies before them, postmodernists, it is contended, retain no place from which to launch or justify their own positive proposals for social change: how can they ground their own critique, if there is no ground on which to stand? In denying all claims to truth and neutrality, critics deny their own capacity to make evaluative or uncontroversial claims: How can critique transcend its own injunction against transcendence? If a formally coherent and substantively realizable legal order is impossible, there will be no legal system against which to mount a political critique or against which to work for progressive change. If law does not have any definite contours or shape, how can its shape or contours be good or bad?<sup>16</sup>

It is against the backdrop of this problem that Minow's work in law and politics must be understood and assessed. Her focus is the dilemma of difference, but she uses it as a window on the most punishing questions on the postmodern agenda in terms of race and gender. In particular, she asks: How it is possible to speak in meaningful and cogent ways about *race*, *gender*, or *difference*, if any knowledge or understanding is socially constructed, historically positioned, and politically partial?

### III. MINOW MOVES

Categorization is the boon and bane of human existence. While the ability to name and label the world is necessary in order to bring it down to manageable and meaningful proportions, the act of so doing ensures that there can never be an unmediated view or participation in reality. The taxonomic tendency is never value-free, but always situated within a larger normative universe; it is less a matter of technical refinement and more a case of creative designation.<sup>17</sup> In this way, understanding is always a form of misunderstanding and seeing is always a kind of blindness. The process of labeling and naming is particularly fraught with difficulties and dangers when it concerns people. While aspirations to treat everyone similarly overlook genuine differences between people and trivialize each person's uniqueness, the tendency to treat everyone differently ignores the sameness of people and fails to respect each person's humanity. To categorize is to choose and, in so

---

16. See, for example, Cossman, *A Matter of Difference: Domestic Contracts and Gender Equality*, 28 OSGOOD HALL L.J. 303 (1990); Duclos, *Lessons of Difference: Feminist Theory on Cultural Diversity*, 38 BUFFALO L. REV. 325 (1990).

17. See Cohen & Hutchinson, *Of Persons and Property: The Politics of Legal Taxonomy*, 21 DALHOUSIE L.J. 20 (1990).

doing, there is no escaping the responsibility of judgment or its context of power.

A crucial setting for studying the dilemma is law. Not only does law comprise a potent vocabulary for assigning and locating difference, it imposes itself coercively on the lives of those who come within its embrace: "Law backs up words and concepts with power" (p. 97). It is the burden of Minow's book to explore the ways in which the law articulates, confronts, and responds to the dilemma of difference. As the social medium and forum par excellence for constructing and enforcing difference, law provides a convenient lens through which to examine critically the production and interaction of power and knowledge. By deconstructing the limiting and limited assumptions of present legal practice, Minow strives to glimpse and act upon its reconstructive potential. Despite the current failings of the legal system, Minow maintains that it is possible to transform rather than trash law so that, suitably rejigged and reoriented, it can make all the difference in the continual struggle to turn difference into a source of pride and not a mark of discrimination.

In working towards this progressive program of legal change, Minow begins by highlighting five closely related, but unstated, assumptions that inform and energize existing legal understandings of the difference dilemma (pp. 50-74). First, differences are treated as intrinsic rather than as expressions of comparison between people; it is the person who is labeled different rather than her or his relation to others. Second, the point of reference from which the assessment of difference is made remains unstated; this gives the distinct impression that the norm of judgment is inevitable and natural. Third, the person judging difference is thought of as having no perspective rather than as having a particular situated perspective; that a perspective is widely shared does not make it any less of a perspective. Fourth, the perspective of those being judged as different is treated as irrelevant or already accounted for by that perspective; a person's perspective or self-understanding is thought of as unrelated to how others react or judge. Finally, it is assumed that existing social and economic arrangements are natural and neutral; any departure from the status quo runs the risk of partiality and interference with the free choice of individuals. In total, the collective force of these unstated assumptions is to make the difference dilemma seem inevitable and irresolvable: "Noticing difference and ignoring it both recreate difference; both can threaten such goals as neutrality, equality, and freedom" (p. 74).

Having identified the sources of difference, Minow proceeds to canvass the prevailing theoretical models available from which to construct a convincing and workable response to the difference dilemma. Although her treatment of these alternatives is informed and sensitive, she gives short shrift to contemporary legal theories and their reforma-



tive claims (pp. 146-72). In its own particular way, each of the theories that she canvasses tends to rely on one of two traditional approaches. One is the abnormal-person approach, which situates the problem of difference within a simplistic either/or construction and thereby defeats any possibility of its resolution. By treating differences as intrinsic, it makes the different person into the problem and assumes difference to be obvious and natural. This approach denies that there is some perspective or norm against which difference is perceived and measured: "The perspective of those who have been named 'different' is thought to be inconceivable — and irrelevant" (p. 215). The other is the rights-based approach, which recognizes the judgmental nature of differences, but persists in maintaining the idea of a viable distinction between normal and abnormal and in perpetuating its legal consequences. While more tailored and situation-specific solutions to problems of difference are possible, rights analysis leaves untouched the larger and objectionable patterns of power distribution that reinforce the nature of differences as static and rooted: "[Rights analysis] offers little insight into how an observer constructs what is 'real' and poses a special dilemma for those whose differences seem 'real' against the backdrop of social institutions and practices that make that difference matter" (p. 216).

In place of these unsophisticated and constraining responses, Minow offers a relational approach that takes seriously the epistemological and political ramifications of the difference dilemma: "If the problem has relational dimensions, then so should the solutions" (p. 90). While drawing selectively from a host of disciplinary insights, she relies extensively on the philosophical and practical imperatives of feminist literature (pp. 192-214). The central thrust of the relational approach is that difference is a function of actual relationships between people and social practices; the attribution of difference is the result of a comparison drawn between an individual and a normative standard that is constructed and relied upon by other individuals. Such an approach eschews elevating abstract concerns over concrete experience; it comprehends personhood as based on autonomy and separateness for caring and thinks about relationships as natural, fixed, and immutable: "[P]eople live and talk in relationships and never exist outside them" (p. 111). By treating difference as part of a historical context of social relations, Minow's preferred approach insists that, as difference is always a negotiated and constructed notion of practice, it can be renegotiated and reconstructed:

A relational approach, like the abnormal-persons approach, assumes that people live within networks of relationships; but unlike the abnormal-persons view, it challenges fixed status and attributed difference. And unlike rights analysis, the relational approach inquires into the institutional practices to determine the norm against which some people seem different, or deviant. Also unlike rights analysis, relational ideas

raise questions about how anyone knows and how the observers' relationship to the observed influences what they think they know. By stressing the unavoidability of perspective, the relational approach makes all claims of knowledge vulnerable to the same charge: "But that's just your view." It encourages more debate and highlights as human choices — rather than acts of discovery — the way we treat people, the traits we call "different," and the social institutions that embody and reinforce those assumptions. To address relationships is to resist obstruction and to demand context. [p. 216]

To operationalize the relational approach in the struggle to meet the dilemma of difference, Minow chooses to reclaim the voice of rights talk by reconstituting and revitalizing it in accordance with a relational dynamic. Junking the notion of rights as a set of fixed and abstract claims, she wants to revalorize it as a conversational discourse through which to establish community in the struggle for meaning. Detached from extant protocols of power, a concrete and expansive version of rights talk can empower the marginal at the same time it challenges the status quo. While Minow's defense of rights celebrates rather than condemns their lack of neutrality, she seeks to nurture the overlooked possibility that rights claims demand "an equality of attention" and their exercise "sustains the call that makes those in power at least listen" (p. 297; emphasis omitted). In short, notwithstanding the traditional hazards and the obvious pitfalls, "[t]here is something too valuable in the aspiration of rights, and something too neglectful of the power imbedded in assertions of another's need, to abandon the rhetoric of rights" (p. 307).

#### IV. RECOVERING POWER

In its ambitious sweep and persistent sophistication, Minow's book is the rare publication that produces a lucid and telling analysis of a problem whose present understanding and future resolution tend to elude even the most sensitive and thoughtful people. Having read this book, it is impossible not to think and respond to the dilemma of difference differently. By providing a new vocabulary with which to talk about difference, she assures that the problem of difference is transformed in the attempt to resolve it. The book's particular strength is the facility with which it moves between the exacting spheres of meta-theorizing and the practical details of concrete problems. Exhibiting a prodigious erudition, Minow follows her own central injunction always to respect and engage contexts in her situated and courageous efforts to address discrimination in Native American land claims, bilingual education, maternity leave, housing for mentally handicapped, and the employment of African Americans.<sup>18</sup>

---

18. My use of "African American" instead of "black" is deliberate. Africans, including those from the continent and those in the diaspora, have been labeled by Europeans since their

Perhaps because of this enviable insistence on practical relevance and strategic significance, Minow does not attend as closely as she might to the postmodern puzzles suggested by her text: she responds to them only implicitly and indirectly. However, any approach that takes such an uncompromising and rigorous stand on the constructed and contextualized nature of all difference must confront the dilemma of how we know which differences count and how we validate such knowledge. This puts the issues of power and subordination firmly on the postmodern agenda: it ensures that the discussions of difference are about racism as much as race, and about sexism as much as gender. Although Minow is never dismissive or indifferent to the problems of power (pp. 229, 237, 381, 389), she does not elaborate fully the basis on which her own brand of postmodernism makes this challenge. In short, Minow is long on the skeptical nature of truth and knowledge, but short on the political problem of power; she attends to only two sides of the triangle of knowledge, truth, and power.

Accordingly, I intend to concentrate on how postmodernism can be theoretically consistent and remain politically compelling in confronting the ubiquity of power. How can postmodernism confront subordination without suborning itself in the process? My account is offered not so much as a hostile corrective to Minow's shortcomings, but as a supportive supplement to her more practical efforts. Nonetheless, my argument does suggest that Minow should reconsider some of her institutional strategies and adopt a more radical program of change. By giving insufficient weight in her analysis to power's effects, she leaves the impression that discrimination is more a matter of cognitive misperception than a political practice of subordination. A closer attention to power's insidious presence and operation will restore a keener political edge to the postmodern project. In short, I want to combine Martha Minow's insights with those of Catharine

---

original contact thousands of years ago — "nigger," "negro," "colored," and "black" to mention a few. Each of these are European-imposed terms and focus *only* on skin color. Now, for the first time Africans in the diaspora are beginning to rename and reclaim themselves and their collective culture respectively with the name "African American." See M. KARENGA, *THE AFRICAN-AMERICAN HOLIDAY OF KWANZAA: A CELEBRATION OF FAMILY AND CULTURE* (1989). The term allows, in fact *requires*, an identification with a culture, language expression, geography, and a history that denies the oppressive reduction of African Americans to a color only. Many scholars and other people of African descent recognize this as a movement-in-the-positive: liberation arising through self-definition and self-determination by way of an affirmation of consciousness and identity. From a postmodern perspective, "African American" emphasizes appropriately the organic idea of culture, not a static notion of physiological essence. The use of "white European" in place of "white" serves a similar function. Of course, an African-American or white European identity is not a monolithic entity, but is itself constituted through difference and diversity. Furthermore, the problem of race and racism is not represented solely by the engagement between African Americans and white Europeans. My focus on African-American oppression is only one, albeit widespread, manifestation of the problem. In contemporary North America, there are many sites and settings for racism among different cultural groups.

MacKinnon.<sup>19</sup> Whereas Minow can check the essentialist tendencies of MacKinnon, MacKinnon can provide the political radicalness that Minow intimates, but ultimately shies away from.

In her pioneering work, Catharine MacKinnon has more than any other scholar insisted upon the sustaining connection between epistemological framework and political power; the ability of the male point of view to appropriate the standpoint of neutrality and objectivity has been crucial to the project of institutional patriarchy. However, in her efforts to emphasize the reinforcing relation between power and knowledge, MacKinnon has fallen victim to the modernist contagion. Rather than recognize the contingent and constructed character of women's experience, she runs perilously close to grounding her analysis of women's oppression in a notion of "essential womanhood." She presupposes a presocial, supracultural, and free woman who, laboring under false consciousness, is constantly trying to throw off the yoke of male domination. Her text and critique is structured around the idea of "women's point of view" and "women's voice"; the ambition is to give women really what they want and "on [their] own terms."<sup>20</sup>

The effect of this essentializing tendency is to rob, not imbue, the work of its radical potential. It inadvertently reinforces the essentialist epistemology of the traditional thinking that it condemns and seeks to dislodge; it recovers women's subjugated knowledge as a corrective to the partial and selective truths of male thinking. So hegemonic and systemic is the male perspective in the MacKinnon scheme of things — "women exist[] in a context of terror"<sup>21</sup> — that women only feature as perennial victims and authentication is reserved only for the experience of subordination. Apart from other things, this epistemological approach is invalidated by MacKinnon's own writing, for if the male perspective is so pervasive, what can validate MacKinnon's own analysis and what is the "true" experience that is sublimated by false consciousness? By downplaying the important intersections of class, race, and sexual orientation, she risks reducing "woman" to a necessary and natural category that is as much the root of the sexist problem as it is the seed for the feminist solution.<sup>22</sup> Her account is almost so flat, static, and all-embracing that there is no space or opening from

---

19. See C. MACKINNON, *FEMINISM UNMODIFIED* (1986); C. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989). Minow mentions, but does not grapple with, the challenge of MacKinnon to Minow's own brand of critique. Pp. 50, 217.

20. C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 19, at 88, 160, 195, 83 & 22 (emphasis omitted); Colker, *Feminism, Sexuality and Self: A Preliminary Inquiry into the Politics of Authenticity* (Book Review), 68 B.U. L. REV. 217 (1988).

21. C. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*, *supra* note 19, at 151; see also A. DWORKIN, *INTERCOURSE* (1987); Littleton, *Feminist Jurisprudence: The Difference Method Makes* (Book Review), 41 STAN. L. REV. 751 (1989).

22. See Harris, *Categorical Discourse and Dominist Theory* (Book Review), 5 BERKELEY WOMEN'S L.J. 181 (1990).

which to launch any transformative action: she can only chronicle the sources and strategies of victimization rather than provide explanations that themselves can become forms and founts of resistance.<sup>23</sup> Domination becomes a seamless web that is total in its intelligibility and, being bereft of complexity and contradiction, is exclusionary in its politics.

Yet, as much as MacKinnon's account is in need of postmodern renovation, much is worth retaining. The great strength of the work is its unrelenting attention to power and its insidious operation. For her, the question of oppression is not about race and gender, but about racism and sexism. Inequality is not a question of difference, but of dominance: "the issue of discrimination or inequality is not centrally one of accurate categorization [but it] is one of hierarchy, the top and bottom of a hierarchy are different all right, but that is hardly all."<sup>24</sup> She is uncompromising in her view that it is male and white supremacy that must be confronted as a political phenomenon rather than as a moral dilemma. She insists that the attempt to give women a voice of their own will not be possible until substantive change is made in social arrangements as well as in people's way of thinking because, at present, "his foot is on her throat."<sup>25</sup>

For MacKinnon and her modernist kin, the flirtation with the postmodernist perspective is a *liaison dangereuse*. The essentialist leanings of their standpoint epistemology have been relatively successful in effecting legal reforms, in facilitating the entry of feminists into the "malestream" academy and in obliging its scholarly practitioners to take feminism seriously. Accordingly, some maintain that feminists "cannot afford not to be essentialist."<sup>26</sup> Any postmodernistic concessions, these feminists argue, will simply play into the hands of the white male establishment; there can be little prospect of liberation from patriarchy without a secure grounding in the possibility of a coherent self or a self-correcting reason. These fears are understandable and reasonable, but they are overstated and mistaken. Essentialists wrongly contend that postmodernism is a form of political betrayal that jeopardizes the integrity and solidarity of feminism. Moreover, they are unconvincing in their claims that significant realignments of power are probable within the existing protocols of power and knowl-

---

23. See Smart, *supra* note 11, at 208.

24. *Feminist Discourse, Moral Values, and the Law — A Conversation*, 34 BUFFALO L. REV. 11, 21 (1985) (comments of Catharine MacKinnon).

25. *Id.* at 74-75.

26. Young, *Of The Essential in Criticism: Some Intersections in Writing, Political Protest and Law*, 1 LAW & CRITIQUE 218 (1990); see also Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Hawkesworth, *Knowers, Knowing, Known: Feminist Theory and Claims of Truth*, 14 SIGNS 533 (1989).

edge. It is the burden of the remainder of this essay to make the positive case for a postmodern politics.

## V. IN QUESTION?

And so, returning to the question of how do we speak of *woman*, of *gender*, and of *difference*, I believe that the answer is carefully and contingently.

— Brenda Cossman<sup>27</sup>

The postmodern imperative entails no necessary program of political action. Nothing necessarily follows from a rigorous nonessentialist mode of critique, least of all an essentialist dogma of correct politics. Postmodernists reject a belief in any single, accurate, or true vision of community or social justice; a deconstructive critique must not be allowed to become the last refuge of an essentialist scoundrel. There is no one true story to tell and all claims to knowledge must be tentative and provisional. Under a postmodern attachment, the details and priorities of a transformative program must be the continuing subject of healthy debate, respectful disagreement, and continual reappraisal. There is no place for an enforced orthodoxy or rigid conformity for "[a] just society is not a society that has adopted just laws, once and for all, rather it is a society where the question of justice remains constantly open."<sup>28</sup>

Rejecting programs and positions, the postmodern critic must attend to the local and contingent circumstances of claims to knowledge and to the situated places from which people speak. Although reality is always multiple and never transcendent, a situated truth is no less real for being situated and not stable; the experience of self is simply not real in any metaphysical sense of true, objective, or complete. The idea and experience of self is never fixed nor final, but is always fluctuating and formative. It is a site of constant struggle that cannot be worked towards, but must be worked *from* in the unfinished process of reworking. "Self" is neither separate nor separable from the constitutive practices of social life that shape and are shaped by it. Whereas the traditional metaphysics of modernism aims to settle on an abiding identity in the competing relation of sameness and difference, a deconstructive critique looks to destabilize the very possibility of grasping identity as self-presence. This is not to disavow identity, but to make its status always contingent and revisable.<sup>29</sup> The radical nature of postmodernism is its insistence that difference resides *within* identity, not outside it.

The temptation for postmodern critics is to compromise on their

27. Cossman, *supra* note 16, at 353.

28. Castoriadis, *Socialism and Autonomous Society*, 1980 TELOS 91, 104 (emphasis omitted).

29. D. Fuss, *supra* note 10, at 102-05.

deconstructive rigor and to privilege a politics of experience. This is dangerous and unnecessary. Like everything else, experience is itself always and already the product and subject of interpretation; it cannot escape interrogation by masquerading as its own grounding. The valorization and privileging of "experience" is dangerous because it trades in the devalued coinage of a false authority drawn from a counterfeit authenticity. By positing a shared or common experience for "women," for instance, it relies on reductionist notions of exclusion and universality that betray postmodernists' most basic beliefs. Experience is itself indeterminate and "[b]elief in the truth of Experience is as much an ideological production as belief in the experience of Truth."<sup>30</sup>

Instead, there must be unflinching respect for the dialectical and dynamic nature of experience and the provisionality of any emergent conclusions. This is not to trivialize experience, but to devalue it as metaphysically relevant and to revalorize it as politically significant; experience is the beginning of any skeptical inquiry, not its ending.<sup>31</sup> There is simply no available method that can validate the knowledge of any individual or collective experience. No account can (or should want to) claim to be more deserving of metaphysical sanction than any other: the experience of men, women, persons of color, and so on, is a political assertion and not a metaphysical pronouncement. It is as impossible to be only a man, woman, African American, or white European as it is to be never a man, woman, African American, or white European. Experience is a melange of "the attributed, the imposed, and the lived."<sup>32</sup>

Resort to a full-blown "politics of experience" is unnecessary because its proponents assume that, without such a base or foundation, there will be no way to galvanize or preserve the integrity and power of a political activism. Those who cling to such a belief have insufficiently shaken off the modernist mindset. Postmodernism is nonfoundational and nonessentialist, not antifoundationalist or antiessentialist. A studied antiessentialism is the mirror-image of essentialism and is always beholden to it for definition and thrust. Nonessentialism is not what essentialism becomes "when it imagines itself turned upside down."<sup>33</sup> As such, warnings of anarchy and nihilism only have force within an essentialist frame of normative reference; such warnings imply wrongly that it is only because of the very

---

30. *Id.* at 114; see also J. GRIMSHAW, *PHILOSOPHY AND FEMINIST THINKING* 85 (1986).

31. See Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 603 (1986).

32. D. RILEY, "AM I THAT NAME?": FEMINISM AND THE CATEGORY OF "WOMEN" IN HISTORY 110 (1988).

33. B. SMITH, *CONTINGENCIES OF VALUE: ALTERNATIVE PERSPECTIVES FOR CRITICAL THEORY* 151 (1988).

possibility of achieving the essentialist dream that such lawlessness has been staved off.

Postmodernism is itself a contingent perspective that sees itself and all others as equally and unapologetically contingent; "the best thing to do" is always open to revision and reassessment. Its protagonists recognize that a thoroughgoing nonessentialism neither deprives nor endows people with a moral sensibility or political conscience. Its proponents know that there are no easy and objective answers, but only difficult choices; that law, tradition, and the like are not a solution in themselves, but are a resource in reaching a solution. They attempt to listen to and empathize with the plight of others, to retain a willingness to rethink their own views in light of that experience, to put their own apprehended authority in question, and to initiate actions for which they are prepared to take personal responsibility. Judgment and action is about humility, not hubris.

In the urgent struggle to combat the pervasive racism and sexism in society, postmodernists must work from the operating assumption that African Americanness or "womanness" has no essence. As Frantz Fanon so pointedly put it: "The Negro is not. Any more than the white man."<sup>34</sup> The idea of African Americanness and "womanness" offers no ontological ground from which to launch a political assault on racism and sexism; such categories are best destabilized and decentered.<sup>35</sup> This is not to slip into the error of suggesting that matters of racial or sexual identity are fictional or that the experience of racism or sexism is contrived. The postmodern challenge is not to dehistoricize so as to trivialize racial or sexual identity better, but to rehistoricize them so as to validate them better. To be against racism and sexism is an engaged act of political commitment, not an abstruse question of metaphysical authorization. To believe or act otherwise is to warrant the very racial and sexual essentialism that sustains the present institutionalization of racism and sexism.

As Minow so powerfully demonstrates, domination has been perpetuated and rationalized both by embracing difference (superiority of men over women and white-skinned people over black-skinned people) and by eschewing difference (treatment of women as men and African Americans as white Europeans). Taking difference seriously will be threatening — for some people. It means giving up a whole lot of advantages that are so deeply embedded in the fabric of society that they are overlooked and taken for granted. Many claim that they do not exist. These are the advantages that have made the establishment of power overwhelmingly white and male. Recognizing that African-

---

34. F. FANON, *BLACK SKIN WHITE MASKS* 231 (C. Markmann trans. 1967).

35. See Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581 (1990).



American, female, or gay people have different viewpoints forces the dominant white, male, and heterosexual people to recognize that they have points of view. Not *the* point of view, but simply one point of view among many. Moreover, it challenges the idea that whites or males have a monolithic voice; difference is within as well as between identities. It obliges them to subject those views to scrutiny, like any other views that no longer come couched in the accent of the eternal.

Of course race, gender, and sexual orientation matter. It is not that women, gays, or African Americans possess any permanent, universal, or natural characteristics that differentiate them from white heterosexual men. Differences are culturally imposed and socially policed. A formative influence in the cultural tradition of women, gays, and African Americans is their social and historical experience of oppression. It is not the fact that they have wombs, homosexual preferences, or black skin that is important, but the way that those with wombs, homosexual preferences, or black skin have been treated. The social situation of those discriminated against affects their view of themselves and their discriminators. This results in a cultural tradition that reflects a different experience and normative viewpoint. It is essential that these out-groups speak for themselves and analyze the conditions of their domination and its possible overcoming. Indeed, in contemporary society, it is more likely that "the dominated usually understand the dominant better than the reverse. In coping with their daily lives, they simply must."<sup>36</sup> But this realization and its articulation will be an active piece of political persuasion, not a contribution to a process of metaphysical clarification.

While to deny entirely racial, gendered, or sexual identities is to fool ourselves and court complicity, to accept them entirely is to ignore their ideological production and, therefore, the possibilities for their political transformation. It is as culpable to ignore difference as it is to dwell on it as an excuse to take it seriously. The goal is not to locate and give expression to the authentic voice of African Americans', gays', or women's experience — this will ensure the continued dominance of white and male voices against which other voices will always vie for attention and whose importance will be reinforced at the very moment of their greatest threat. Nor must postmodernists engage in a neutral deconstruction in the name of a postgendered and postracial subject or a glorious refinement of the completed category of "real womanness," "gayness," or "African Americanness." The

---

36. R. ROSALDO, *CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS* 189 (1989). These comments raise the specter of the recent debate in the legal academy over the validity of racial critiques of the law on legal scholarship. See Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989). In this debate, I clearly take the view of Richard Delgado. See Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984).

notions of race, sexual orientation, and gender must always be treated as neither good nor bad in themselves, but as local and unstable sites that both define and are defined by struggles over their contingent configuration and reconfiguration. Feminism and Afrocentricity are one kind of intervention in that contested process.<sup>37</sup>

The abandonment of any lingering essentialism allows postmodernists to concentrate on local conditions and their potential for constructive intervention, without being distracted by metaphysical preoccupations or ideological posturing. Although people are never not in a local context, they are never in a context that is not open to contingent revision.<sup>38</sup> Yet postmodern activists must be vigilant to avoid essentializing the local or the political as a ground for action; local politics represents "only a fragmented set of possibilities that can be articulated into a momentary politics of time and place."<sup>39</sup> In this way, it becomes viable to resist the disempowering effect of affixing women and African Americans with the stigma of "victims." The failure to distinguish between the *processes* of victimization and *women as victims* is disabling: whereas the former allows for active resistance by victims themselves, the latter makes them into only the grateful beneficiaries of enlightened despotism.<sup>40</sup> By engaging in local

---

37. I use "Afrocentricity" tentatively. Combining philosophy, science, history, and mythology into an encompassing collective cognitive imperative, Afrocentricity is not a political ideology, but rather a world view that places Africa at its center. It is a cultural recentering and a historical reclaiming of African expression and symbols. See M. ASANTE, *AFROCENTRICITY* (1988). Afrocentricity strives to be a transformative agent that focuses on attitude, values, and behavior and requires an epistemological and ontological insurrection against Western hegemonic practices, values, and discourse. For the most part, it is a positive program to facilitate cultural awareness, social reconstruction, and economic empowerment through the undoing of colonized thoughts.

Like feminism, Afrocentricity is a way of talking about and being in the world and is invaluable different from the dominant "point of view." Feminism recognizes the relations of power and privilege that have characterized the silencing and violence committed against women by men in a patriarchal society. Similar to Afrocentricity, feminism is not only a political ideology, but is a recognition of the "his-torical" erasure of women's contributions and importance throughout history: it highlights the appropriation of women's sexual, productive, and reproductive capacities for the betterment of mankind. However, Afrocentricity is different in that it is viable, in a postmodern sense, to talk about a precolonial African culture in a way that it is not entirely possible to refer to a prepatriarchal feminist culture. The life-way of American-Afrocentricity combines a precolonial culture with the experiences and values that have grown out of the history of indentured servitude in America and with the aspiration for a nonsexist society. Both feminism and Afrocentricity seek to reclaim a cultural identity in the process of remaking it.

38. See Coombe, *supra* note 9. This effort to work the important space between the routine and the revolutionary, thereby avoiding the unnecessary obligation to either the universal or the local, is best represented in the work of Roberto Unger and his practical idea of internal development. See R. UNGER, *CRITICAL LEGAL STUDIES MOVEMENT* (1986); R. UNGER, *POLITICS: A WORK IN CONSTRUCTIVE SOCIAL THEORY* (1987). For a constructive critique of this project, see Hutchinson, *A Poetic Champion Composes: Unger (Not) on Feminism and Ecology*, 40 U. TORONTO L.J. 271 (1990).

39. Probyn, *Travels in The Postmodern: Making Sense of the Local*, in *FEMINISM/POSTMODERNISM*, *supra* note 9, at 176, 187.

40. See Hunt, *The De-eroticization of Women's Liberation: Social Purity Movement and the Revolutionary Feminism of Shelia Jeffries*, *FEMINIST REV.*, Spring 1990, at 23, 24.

politics, postmodernists might be able to open up a space in which the presently oppressed can reclaim their destiny and work toward a future society that is truly egalitarian.

## VI. GO NO MORE A-COURTING

Designed for more modest waterways, the ship of judicial statecraft has predictably been run aground by the rough seas of realpolitik. However, like too much modern legal scholarship, Minow's proposals seek to salvage the adjudicative enterprise rather than junk it. Indeed, a major ambition of her work is to demonstrate that "the relational turn can offer law a new model for dealing with problems of difference" (p. 227). However, in keeping faith with the courts as viable forum for transformative action, Minow leaves too much untouched and runs very high risks.<sup>41</sup> In a sense, success would be her and society's worst enemy. If the judicial form changes, but the substance of decisionmaking remains the same, courts will make a bad job look good without altering its thorough badness. Admittedly, a transformation in argumentative style might produce greater candor, but it has no necessary implications for the results reached.

Indeed, Scott Altman maintains that candor is not all that it is democratically or morally cracked up to be. He proposes that "judges holding inaccurate beliefs about their decisions might decide better than they would with a clearer understanding of their actions."<sup>42</sup> Telling the emperor that he has no clothes on is more likely to result in a redoubling of belief than in a feeling of liberation. In particular, Altman argues that the indeterminacy thesis is self-fulfilling and politically harmful as, in a world in which most judges are conservative by inclination and inculcation, the demonstration that law does not in fact constrain is a dubious achievement and the exposé of reactionary values will not lead to their official abandonment.<sup>43</sup> Yet, rather than conclude that the very process of rule by the judiciary in a liberal democracy be abandoned, Altman advocates a continuing exercise in judicial disingenuity, stamped with an academic imprimatur. For Altman, on the other side of candor lies deceit and connivance. While Minow does not countenance such duplicity, she remains unnecessarily attached to the transformative potential of litigation.

Furthermore, history does not justify Minow's gamble that judges will take seriously the idea of empathic encounter and act upon the vocal challenge of previously excluded perspectives. Rather, it is likely to be used as one more device to reinforce and legitimate the

---

41. This argument is given a fuller airing in Hutchinson, *The Three 'Rs': Reading/Rorty/Radically* (Book Review), 103 HARV. L. REV. 555, 578-83 (1989).

42. Altman, *supra* note 13, at 299.

43. *Id.* at 348.

illusion of a privileged reality and vision of justice.<sup>44</sup> Her sincere but naive faith that argumentative style is more important than the arguer's identity implicitly assumes that which she chastises in others — judges decide as they presently do in large part because of their normative instincts and political assumptions. The intellectual act of making these instincts and assumptions more visible and self-conscious will not by itself change the decisions reached. Although the unveiling of these assumptions might spur greater reflection and motivate an occasional change of heart, most judges will validate and ratify their informing visions; they decide as they do because of, not in spite of, their instincts and assumptions. Little suggests that the adoption of Minow's empathic proposals, unless accompanied by substantial reconstruction of socioeconomic conditions, will usher in a fresh era of egalitarian justice.

Ultimately, Minow runs perilously close to falling into the same trap that ensnares Ronald Dworkin's misplaced optimism. Instead of projecting adjudication as a matter of principle, she wants very much for it to be a process of empathic encounter. Indeed, she eschews the resort to abstract principles because they "distract attention from contexts and carry an illusion of uncontroverted answers" (p. 322) and "portray a false simplicity among a rabbit warren of complexity" (p. 370). Nevertheless, she remains content to keep strategic faith with the transformative potential of courts and to portray the Supreme Court as an "institution that calls some issues from the battleground of power politics to the forum of [empathy]. It holds out the promise that the deepest, most fundamental conflicts between individuals and society will once, someplace, finally, become questions of justice."<sup>45</sup> But it is just answers that we want, not pregnant questions of good intent. Unless and until there is a change in the ideological identity of society's decisionmakers, the answers given to the "deepest, most fundamental conflicts" will remain all too familiar and all too questionable. It is not increased empathy that is required, but a substantive reordering of empathic responses.<sup>46</sup>

Progressive scholars must look for better and different ways to empower disadvantaged groups than constitutional litigation.<sup>47</sup> The first step is to raise the critical consciousness of lawyers by disabusing them of their ingrained habit of resorting to the courts as the transformative forums of choice. They must become more sensitive to the debilitating

---

44. See M. TUSHNET, *THE RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988).

45. R. DWORKIN, *A MATTER OF PRINCIPLE* 71 (1985).

46. See Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?* 87 MICH. L. REV. 2099, 2113 (1989).

47. For an extended development of such an approach, see A. Hutchinson, *Begging The Question: Les Misérables Redux* (1991) (unpublished manuscript on file with author).

effect of extended involvement by courts in civic life. Nevertheless, while it is crucial not to exaggerate the contributions of courts, it is equally important not to overstate the democratic qualities of representative institutions nor to deny entirely the possibility that legal forums could contribute to transformative struggle. The fear of cooptation must not lead to paralysis: the categorical denial of rights-talk is almost as bad as its categorical embrace. Sensitive to the contingent possibilities of any particular moment in social history and mindful that all struggle is already situated within mechanisms to be resisted and reworked, the only available strategy is to develop legal tactics that politicize and disrupt the courts as they use the mechanisms in litigation.<sup>48</sup> The challenge is to engage in law and, at the same time, to delegitimize it by eschewing abstract notions of justice and rights in favor of concrete challenges.

Secondly, progressive lawyers must develop a posture of "strategic skepticism" toward the efficacy of even limited use of litigation in the struggle for social justice. To direct the have-nots to the courts as a matter of course is to throw good money after bad. Nevertheless, in a political culture that gives a major role to litigation and in which rights-talk possesses a special resonance, claims phrased in the rhetoric of rights might be less easily rejected and might catalyze the mobilization of popular struggle. It might be possible, for instance, to point out the frequency with which contemporary society fails to live up to its own expectations.<sup>49</sup>

A program of "strategic skepticism" would be more the cultivation of a particular mindset and the refinement of various tactical techniques than the establishment of a manifesto of litigable claims. The core idea is to act in a guerilla-like way — within a broad set of progressive objectives, to seize the possibilities of any contingent moment in order to achieve judicial decisions that heighten the status quo's contradictions and open up space for lasting political action. It is imperative in pursuing such legal tactics that lawyers do not become intoxicated by the spirit of their own rhetorical excesses. To take the reasoning of the judges seriously is once again to validate the very institution that is to be subverted: it is to fall victim to the contagion

---

48. For a power-oriented rather than rights-centered approach to law practice, see Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1983); Glasbeek, *Some Strategies for An Unlikely Task: The Progressive Use of Law*, 21 OTTAWA L. REV. 387 (1989); Smart, *Feminism and Law: Some Problems of Analysis and Strategy*, 14 INTL. J. SOC. L. 109 (1986).

49. The record of the civil rights and abortion movements offers evidence of the limited successes (and dangers) of obliging the political and legal establishment to honor its own half-hearted commitment to the universal dimension of rights-talk. See Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law*, 101 HARV. L. REV. 1331 (1988); Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987); Schneider, *supra* note 31.

of traditional jurisprudence in which law thrives as a rational enterprise of abstract politics. It is only by maintaining a thoroughgoing skepticism to such talismanic tendencies and by recognizing the strategic significance of such litigation in particular socioeconomic circumstances that the viability of any use by progressive lawyers of the courts can be sustained.

## VII. ABSENT FRIENDS

If there is one motif that runs throughout the motley writings of the postmodernist crew, it is the insistence that constant attention must be paid to the time and place from which people speak. In the name of diversity and empathy, the ambition is to comprehend others as we would wish ourselves to be understood as individuals "with a concrete history, identity and affective-emotional constitution."<sup>50</sup> Celebrating the specific over the general and the situated over the abstract, postmodernism particularly rejects the idea of the oracular intellectual who pronounces global truths in a universal voice. Instead, the intellectuals' work should be informed by a solicitous sensitivity to the organic circumstances of the problem to be addressed and any solution to be professed. In the postmodern playbook, situation-sense is always preferable to abstract reflection: the personal is political and the political is personal.

A particular strength of Minow's work is its unflagging application of this postmodern injunction; she is meticulous in her attention to the detailed differences of individual circumstances, social contexts, and institutional practices. Nevertheless, her text is curiously and confoundingly lacking in one central detail — Minow is nowhere to be found. In a postmodern manner of speaking, the author is only metaphorically present in her literal absence. Although she rightly lectures on the significance of subject-positions and their political valence, she does not put in any appearance in *Making All the Difference*. The reader is left with little idea, except by inference or supposition, about the subject-position from which she herself speaks. Unfortunately, she neither presents nor problematizes herself for scrutiny or reference. In her self-effacement, she manages to occupy a critical space that is both everywhere and nowhere: she floats over and through her text as a kind of postmodern phantasm. As a thinker of specificity, she remains paradoxically unspecified in her own concreteness. In so doing, she comes unintentionally close to invoking the presumed authority of detached analysis and continuing the unconvincing ventriloquism of modernist thought. Contrary to her own postmodern desires, she re-

---

50. Benhabib, *The Generalized and Concrete Other: The Kohlberg-Gilligan Controversy and Feminist Theory*, in *FEMINISM AS CRITIQUE* 77, 87 (S. Benhabib & D. Cornell eds. 1988).

mains unsituated and unseen. How and in what way is she different or similar to others? For whom does she speak?

I want to emphasize that I intend to suggest by these remarks nothing suspicious or sinister about Martha Minow's identity of motivations. On the contrary, in any personal or textual interactions with her, I have admired her genuine commitment to improve the plight of the disadvantaged. Indeed, I am sure that inserting herself into *Making All the Difference* would not only enhance its methodological integrity, but would strengthen its political cogency. My point is that her absence from the text is simply puzzling in light of her own postmodernist concentration on the politics of identity and difference. Moreover, I want to take advantage of that oversight on her part to explore the implications of postmodernism for intellectual and political practice. However, rather than engage in idle speculation about the terrain that is Martha Minow, it is much more pertinent to reflect on the "concrete history, identity and effective-emotional constitution"<sup>51</sup> that makes up the individual known as Allan Hutchinson. As a member of the establishment by color, gender, culture, and sexual orientation, it promises to be more instructive. From where do I speak? From what standpoint do I squabble with Minow? What is my situation and subjectivity in the struggles over racism, sexism, and homophobia? What turf am I defending?

For the postmodernist, these matters ought to be much more than of indulgent or voyeuristic concern. While persons are not reducible to their autobiographies, they never fully escape them; they forge their identities through the existential tension between confronting or confounding their autobiographies. Indeed, one of the first things that people like myself can and must do is actually begin to recognize and accept that they do have a racial, sexual, gendered, and cultural identity. It is an integral part of being a white, heterosexual, English man to *not* think of oneself in such terms. Race, sexual orientation, gender, and ethnicity are the burden of others — "I am simply me, but you are lots of different things." As Minow so astutely observes, for my stereotypic individual, difference is intrinsic to others and perspective is what others have (pp. 50-74): I am the norm because I am normal. It is this cultivated arrogance and metaphysical elitism that must be named and rooted out. Heterosexual white European men must learn to accept that equality is not simply about ensuring that everyone shares the same privileges, but that their position has always been one of privilege and was obtained at the expense of others. Affirmative action has been around for a long time, at least for white European, heterosexual males.

As a white European, heterosexual man, it is important that I play

---

51. *Id.*

a part in the struggle against racism, homophobia, and sexism: passivity is the unwitting ally of continued oppression. By recognizing my own gendered, racial, and sexual identity, I might begin to decenter my own experience and authority and make present this empowering absence. But any intervention must be self-consciously cautious. The challenge is to follow and not to lead, to learn to listen as well as to speak. In particular, I must studiously avoid the possibility of appropriating the experience of others and claiming to speak on their behalf. Similarly, I must not posit or empower the Voice of others, but must recognize that there are many voices that must be heard. In the process of coming to know myself afresh in racial, sexual, gendered, and cultural terms, I can decenter myself both metaphysically and politically. In that way, I might be able to contribute positively and appropriately to the making of a community in which genuine dialogue and difference can become truly realized and respected.<sup>52</sup>

The goal is not to achieve justice on my terms: it is not toleration, but affirmation that is needed. The ambition is to strive for a future that is neither entirely white European nor African American, male nor female, heterosexual nor homosexual. But nor is it to establish a society that is a homogeneous mush of bland sameness. It is a mistake to imagine that the options are limited to handing over the establishment to the presently disadvantaged or allowing them entry on the condition that they forget who they are and become the same as those presently in power. A society that truly seeks to become diverse must recognize that *everyone* will be transformed with the eradication of sexism, racism, and homophobia. Losing our identities as oppressors and oppressed, we will be able to meet as equals and celebrate the cultural diversity that makes each of us partly who we are and partly what we can become. It is in this aspiration and cause that people can achieve a solidarity that will make all the difference.

Finally, I must recognize that the clearing of the postmodern throat at this particular time is not without controversy or skepticism. For some, it is highly suspicious that changes against essentialism and foundationalism should come at precisely the moment that other voices, previously silenced and stilled, begin to make themselves heard: "Should postmodernism's seductive text gain ascendancy, it will not be an accident that power remains in the hands of the white males who currently possess it."<sup>53</sup> Of course, the danger of postmodernism's appropriation and domestication by the establishment is always a real and serious threat: no theoretical perspective is immune to such cooptation. Postmodernism is both liberating and

---

52. See Hutchinson, *Talking the Good Life: From Free Speech to Democratic Dialogue*, 1 YALE J.L. & LIBERATION 17 (1989).

53. Hawkesworth, *supra* note 26, at 557; see also B. HOOKS, *Postmodern Blackness*, in YEARNING: RACE, GENDER AND CULTURAL POLITICS 28 (1990).



limiting to cultural groups that have been oppressed through a calculated misappropriation of Objectivity, Truth, and Knowledge by a white male establishment. There is nothing intrinsic to postmodernism to prevent further abuse.

Yet, as I have tried to explain, when pursued rigorously and responsibly, a postmodernist approach can be the most fitting and effective complement to a progressive politics. Progressive scholars must articulate the kinds of diverse society toward which we must struggle. Through such an enterprise, it might be possible to avoid the loss of valuable experiences and cultural truths that should be part of what is now believed to be an improved society in concrete but flexible and accommodating terms. Present essentialist strategies already work within rather than against the theoretical framework of established power. The risk of complicity would not be threatening in a truly democratic society that was representative of all groups and affirmed the intrinsic value of all culture, race, gender, and sexual orientation; self-determination, not majority rule, would be facilitated rather than frustrated by the state. Postmodern critique can help pull the political plug on the establishment and allow society to be galvanized by a different source of transformative energy.

### VIII. CONCLUSION

*Making All the Difference* will not make all the difference, but it will and should make a difference. The difference that it does make will, like all differences, depend on the conditions into which it is published and received. It will touch different readers in different ways. By contributing to greater empathy between lawyers and those on the margins of society, Minow has encouraged the creation of public openings for the dispossessed to build their own culture for their own lives. This, in turn, might enrich and transform the lives of lawyers. Different viewpoints must be valued for themselves and not as quaint contrasts to our own. Within this larger project, Minow's book epitomizes the contribution that the legal academic can make in working toward a legal system that is more democratic and less aristocratic in its practices and principles.

As Minow strives to demonstrate, the dilemma of difference goes to the very crux of social theorizing. It is the burden and benefit of the human predicament that we cannot entirely shrug off our present identities any more than we can hope to liberate our one true selves: "No one is saved, and no one is totally lost."<sup>54</sup> Through her turn to postmodernism, Minow reminds us and reassures us that we can struggle individually and collectively to ensure that we forgo the

---

54. M. MERLEAU-PONTY, *THE PHENOMENOLOGY OF PERCEPTION* 171 (C. Smith trans. 1962).

empty attractions of an essentialist metaphysic and make good on our own commitment and confidence in ourselves. In this way, postmodernism is not a submission to the dark forces of nihilism, but a call to energize our lives through dint of our own illuminating efforts at personal and institutional renewal. In her short years, Mary Joe Frug kindled a bright spark which, with care and attention, can serve as a bright beacon for all those committed to ushering in the dawn of a postmodern society. Martha Minow keeps that flame alive.

# GENDER JUSTICE WITHOUT FOUNDATIONS

Marion Smiley\*

FEMINISM/POSTMODERNISM. Edited by *Linda J. Nicholson*. New York: Routledge. 1990. Pp. ix, 348. Cloth, \$45; paper, \$14.95.

JUSTICE AND THE POLITICS OF DIFFERENCE. By *Iris Marion Young*. Princeton: Princeton University Press. 1990. Pp. viii, 286. Cloth, \$39.50; paper, \$12.95.

The term postmodernism was once used very carefully to refer to the rejection of modernist sensibilities in the field of architecture. Today, however, a variety of academics employ the term more loosely to signal their own movement beyond accepted doctrine in whatever discipline they happen to represent. Hence, we should not be surprised to discover that many of the books that now call themselves postmodernist do not teach us anything new about either modernism or what might come after it. Two important exceptions are Linda Nicholson's *Feminism/Postmodernism* and Iris Young's *Justice and the Politics of Difference*.

Both books are valuable in their own right and go beyond most other works on postmodernism in two important respects. First, unlike those studies that use the term postmodernism to connote mere newness or liberation from accepted doctrine, these books explore the nature of postmodernism in depth and articulate its relationship to modernism. Second, instead of treating postmodernism as a mere academic exercise, they take its practical aspects seriously and ask, "What sorts of consequences might we expect to follow from the incorporation of postmodernism into social and political practice?"

*Feminism/Postmodernism* is a collection of intelligent and lively essays organized around the potential value of postmodernism to the women's movement. Many of the essays are by prominent feminist philosophers and were originally published in different contexts. But they all focus in their own way on what would happen to the women's movement if it were to leave behind its universal principles of justice and focus on the cultural differences that exist among particular women. Unlike more purely partisan efforts, the volume does not speak in one voice or put forth one feminist political vision. Instead, it brings together conflicting opinions about what feminists might gain

---

\* Assistant Professor of Political Science, University of Wisconsin, Madison. B.A., M.A. 1976, Mount Holyoke College; Ph.D. 1984, Princeton University. — Ed.

— or lose — from replacing universal principles of justice with a more pluralistic account of women in contemporary society.

*Justice and the Politics of Difference* is an original theory of justice based loosely on postmodernism and its insistence on taking various cultural, racial, and gender differences seriously. The first part of the book focuses on what is wrong with modern theories of justice that assume universal principles of truth and a neutral point of view. The second part of the book develops a group-based theory of justice and draws out its policy implications in areas as diverse as urban planning, law, national representation, feminist politics, and distributive justice.

Since both books purport to be concerned about the practical implications of postmodernism, they are ideally suited to a discussion of how postmodernism might be incorporated into political theory and practice. I suggest below that while both works go far in sketching the contours of a postmodern politics, each in its own way is held back by the philosophical tendencies of earlier postmodernists. Hence, they together constitute an important starting point for those who want to talk about postmodernism as a radical political theory, but they do not fully develop the political aspects of postmodernism itself.

Not surprisingly, their definition of postmodernism turns out to be of utmost importance in this context. Since both Nicholson and Young clearly wish to incorporate postmodernism into social and political practice, they might have developed a political definition of postmodernism itself by, say, including a set of distinctly postmodernist institutions or political points of view. Likewise, since they are both critical of the status quo, they might have included in their definition of postmodernism the sorts of values that would enable them to criticize the status quo as postmodernists. But they do not do so. Instead, they fall back on the standard philosophical definition of postmodernism as the rejection of universal truths, transcendental values, and neutral conceptions of justice.

Nicholson and her coauthor, Nancy Fraser, as feminists, want to go beyond other postmodernists in combining their rejection of foundationalism with the “robust conceptions of social criticism” that feminists offer (p. 20). But they do not develop a “robust conception” of postmodernism itself. Young identifies herself as a postmodernist and draws out the implications of postmodernism for various public policies. But she chooses not to involve herself in metatheoretical questions because, she says, “[w]hen social theorists and social critics focus on such epistemological questions, they often abstract from the social issues [about which they were originally concerned]” (p. 8). Hence, although she, like Nicholson and Fraser, takes postmodernism into the realm of politics, she does not alter the understanding of postmodernism that she inherits from her philosophical mentors. Rather, she retains a sense of postmodernism as the rejection of those

claims to universality and neutrality associated with Enlightenment thinking.

Since these theorists do not develop a political definition of postmodernism, they find it necessary to combine postmodernism with other critical social and political theories. Nicholson and Fraser develop what they call a "postmodernist feminism" (p. 34) by merging their postmodernist rejection of foundationalism with the critical perspectives of the women's movement. Young tries to establish a series of public policies that avoid the universal principles of modernism and capture the postmodern respect for cultural differences by developing a theory of justice based on the expression of group perspectives. The ultimate question for these authors becomes how they can possibly merge their rejections of philosophical foundationalism with a more positive theory of social and political change. The answer, I suggest below, lies in their ability to replace universal principles of justice with the practical criteria of their own radical politics, or, in other words, to develop generalizations about women and other oppressed groups on the basis of their own experiences, rather than on the basis of universal truths.

Nicholson, in her introduction, claims to take the practical criteria of her own radical politics very seriously and admonishes other scholars for not recognizing the politics behind their own analytic categories. "[C]onceptual distinctions, criteria of legitimation, cognitive procedural rules, and so forth are all political and therefore represent moves of power . . ." (p. 11). But she does not, as her admonishments might lead us to expect, begin her analysis by revealing where she stands politically as a feminist. Instead, she begins by exploring two beliefs which, she argues, guide all modern Western scholars in their pursuit of truth. One of these beliefs is that the sort of knowledge worth pursuing is that which reveals the universal truths of natural and social reality. The other is that true knowledge is that which replicates a "God's eye view" of the world, rather than the perspectives of a particular individual or group (p. 2).

Both beliefs persist, according to Nicholson, throughout the academy. But they are especially important to the discipline of philosophy, because philosophers not only assume, but depend for their very academic existence on, the possibility of a truth that transcends history. Not surprisingly, the search for such a truth takes on different forms, depending on the subject matter in question. If the subject matter is art, Nicholson notes, philosophers ask, "What is the beautiful?" If it is ethics, the discussion centers on "the good" or "the right." If it is jurisprudence, we will be cajoled into asking, "What is law?"; and if it is politics, we will be presented with a number of possible projects that require us either to discover human nature or to establish universal principles of justice.

Nicholson argues, along with a variety of other postmodernists,<sup>1</sup> that principles such as these, which try to locate essences, are unacceptable for three general reasons. First, they presuppose an objectivity which, according to Nicholson, is simply impossible. Second, universal principles of truth are not only nonneutral, but also reflect the perspectives of particular groups who are, in most cases, able to exercise more power than others in society. Third, such principles privilege powerful groups over others because the ostensibly universal truths on which they are based are determined by the culture of the powerful. In sum, modern philosophy is, according to Nicholson, both philosophically naive and a form of political domination (pp. 2-4).

Nicholson's view of modern philosophy as political domination might appear to elevate philosophy beyond its actual importance in contemporary society. But philosophical conceptions and assertions are frequently incorporated into more purely social and political arguments in ways that lead to the exclusion of the least powerful in society. Nicholson does not identify particular arguments herself, but she could easily have focused on the recent efforts by liberal political theorists to discern the principles of justice that purely rational individuals would choose.<sup>2</sup> Because these efforts construe rationality as a transcendental, ahistorical quality characteristic of all human beings, they are able to present their principles of justice as universal. But the notion of a transcendental self is itself historically determined, and not even shared by all members of our own community. Hence, those who invoke it not only impose a particular cultural identity on individuals, but exclude from consideration the experiences of those whose identities are self-consciously culturally specific.

Liberal political theory's explicit reliance on principles of neutrality and universality makes it the frequent target of postmodern critiques. But liberal theory is not alone in its imposition of false essences on individuals, nor is it the most oppressive. Marxist theory purports to take history seriously, but it assumes, *a priori*, the universal primacy of economics; it identifies individuals solely with reference to a univer-

---

1. The two most prominent postmodernists writing today are Jean-François Lyotard and Richard Rorty. Lyotard articulates the contours of his theory in *J. LYOTARD, THE POSTMODERN CONDITION* (1984), and *J. LYOTARD & J. THÉBAUD, JUST GAMING* (1985). Rorty develops his postmodernism in both *R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE* (1979), and *R. RORTY, CONSEQUENCES OF PRAGMATISM* (1982). Rorty draws out the political implications of postmodernism in *R. RORTY, CONTINGENCY, IRONY AND SOLIDARITY* (1989); Rorty, *Habermas and Lyotard on Post-modernity*, 4 *PRAXIS INTL.* 32 (1984); Rorty, *Postmodernist Bourgeois Liberalism*, 80 *J. PHIL.* 583 (1983); Rorty, *The Priority of Democracy to Philosophy*, in *THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM* 257 (M. Peterson & R. Vaughan eds. 1988); Rorty, *Solidarity or Objectivity?* in *POST-ANALYTIC PHILOSOPHY* 3 (J. Rajchman & C. West eds. 1985).

2. The most influential of these theories is that of John Rawls. See *J. RAWLS, A THEORY OF JUSTICE* (1971).

sal system of class conflict; and it couches the political aims of a particular revolutionary party in terms of universal, objective, scientific laws of history. Such laws are not, according to Nicholson, really objective, but the reflection of a particular point of view in history, and they cannot possibly be imposed on individuals without domination. Nor can they be reformulated in a more universalist vein without reproducing such domination in practice.<sup>3</sup>

Much of contemporary feminist thought fares no better. Nicholson (writing with coauthor Nancy Fraser in "Social Criticism Without Philosophy: An Encounter Between Feminism and Postmodernism" (pp. 19-38)) argues that although contemporary feminist theories are generally more sensitive than are other theories to the particular contexts in which individuals find themselves, they frequently fall back on essentialist claims about the nature of women or the universal oppression that women experience as women. Examples of such feminist essentialism are not difficult to locate. As Nicholson herself points out, they can be found in liberal feminist claims about the equal abilities of men and women,<sup>4</sup> in the radical feminist categories of sex-class,<sup>5</sup> and in the cultural feminist's focus on "woman's culture."<sup>6</sup>

Each of these feminist theories attempts to be all-inclusive, but they all necessarily exclude particular women by virtue of the universalist claims that they make. Liberal feminists may have good political reasons to push for gender equality under law, but by doing so, they obscure important differences between and among men and women — differences that need to be addressed before any talk of real equality is possible. Radical feminists may see a practical need to talk about women together as a "sex class," but by relying on such a classification and locating the source of all women's oppression in patriarchy, they necessarily distort the experiences of those women who, for example, take their racial or cultural identity as primary. Cultural feminists fall into the same trap by virtue of their universal talk about womanhood.

Nicholson and Fraser's remedy to the universalism trap is to bring feminism and postmodernism together into a "postmodernist feminism." "[T]he ultimate stake of an encounter between feminism and postmodernism is the prospect of a perspective which integrates their

3. Nicholson develops her arguments about Marxism more fully in L. NICHOLSON, *GENDER AND HISTORY: THE LIMITS OF SOCIAL THEORY IN THE AGE OF THE FAMILY* (1986).

4. The range of liberal feminism is of course vast. For an excellent discussion of liberal feminism as a distinct category, see Jaggar, *Political Philosophies of Women's Liberation*, in *FEMINISM AND PHILOSOPHY* 5 (M. Vetterling-Braggin, F. Elliston & J. English eds. 1977).

5. The sex-class analysis mentioned here is not infrequently associated with S. FIRESTONE, *THE DIALECTIC OF SEX* (1970). In recent years, it has been appropriated by a variety of radical feminist historians. See, e.g., G. LERNER, *THE CREATION OF PATRIARCHY* (1986).

6. Such a focus is most pronounced in the works of Mary Daly. In particular, see M. DALY *GYN/ECOLOGY: THE METAETHICS OF RADICAL FEMINISM* (1978). For an excellent discussion of the women-centered analysis in general, see H. EISENSTEIN, *CONTEMPORARY FEMINIST THOUGHT* 139-45 (1983).

respective strengths while eliminating their respective weaknesses. It is the prospect of a postmodernist feminism" (p. 20).

In their essay, Nicholson and Fraser begin with the "respective strengths" of both postmodernism and feminism, rather than with the needs of the women's movement itself. Presumably they feel comfortable in doing so because they view postmodernist feminism not as a set of political practices but as a methodological antidote to modern social and political theory. Postmodernist feminism breaks down the legitimacy of universal truth claims and the interpretative criteria on which these claims are based. Unlike modern social and political theory, postmodernism rejects essentialist claims about human nature and transhistorical ideals of justice. Unlike earlier historicist claims about the inevitable "situatedness" of human thought — claims which, according to Nicholson and Fraser, provide a very weak counter to the norm of objectivity — postmodernism challenges the objectivity of truth itself and claims that the very weak criteria dividing the true and false, science and myth, fact and superstition, are internal to the traditions of modernity and represent the growth and development of specific "regimes of power."

Postmodernism, construed as such, focuses on the forms of power that exist in our methodological standards, extends the fields in which power is thought to operate, and critically analyzes in terms of domination the various universal identities now associated with modernism. Nicholson and Fraser contend that postmodernism, construed as such, is important to feminism both because it breaks down male epistemological privilege in political discourse and because it ensures that a plurality of women's voices — and not just those of upper middle-class white women — will be heard within the feminist movement itself.<sup>7</sup>

But, they worry, postmodernism as now construed does not enable social and political change, since, in the hands of postmodernists such as Francois Lyotard, Richard Rorty, and others, it rejects large scale narratives about both injustice and the oppression of individuals who are oppressed by virtue of their group membership. Both Nicholson and Fraser assume that if postmodernism is to be incorporated into a critical social and political theory, it will have to develop large scale narratives about oppression and become capable of sustaining a focus on economic and political institutions. Although they do not specify the particular narratives and institutional foci that they have in mind, they do make two more general points. First, if postmodern feminists do not develop large scale narratives about oppression, they will be unable to talk about women together as an oppressed group. Second,

---

7. Bell hooks develops a series of arguments throughout her works about how black women have been excluded from much of mainstream feminism as a result of the stamp that white upper middle-class women have placed on their feminist analyses. See her arguments in B. HOOKS, *AIN'T I A WOMAN?* (1981); B. HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* (1984); and B. HOOKS, *YEARNING: RACE, GENDER, AND CULTURAL POLITICS* (1990).



if feminists do not incorporate an institutional analysis into their antifoundationalist world view, they will not be able to assist social and political movements whose goals are practical.

Nicholson and Fraser specify that the theory they envision would be explicitly historical and attuned to the cultural specificity of different societies, periods, and groups. Likewise, it would be "inflected by temporality, with historically specific institutional categories like the modern, restricted, male-headed nuclear family taking precedence over ahistorical, functionalist categories like reproduction and mothering" (p. 34). And finally, such a theory would dispense with the idea of a subject in history — a move which would replace unitary notions of woman and feminine gender identity with "plural and complexly constructed conceptions of social identity, treating gender as one relevant strand among others, attending also to class, race, ethnicity, age, and sexual orientation" (pp. 34-35).

Nicholson and Fraser present their prescriptions clearly and straightforwardly. But they omit several important steps in their effort to present postmodernism as a critical social and political theory. In particular, they do not detail how an insistence on historical specificity will enable feminists to develop large scale narratives or talk about the oppression of groups in society. Both theorists clearly want to rely on the group orientation and critical perspectives of feminist theory to provide a basis for these large-scale narratives and institutional analyses. But they do not say how such large-scale narratives and institutional analyses are possible within the confines of postmodernist theory, which construes both its evaluative criteria and its understanding of identity historically. Instead, they simply assume that they can "integrate[ ] [the] respective strengths [of both theories] while eliminating their respective weaknesses" (p. 20).

Such a merger simply may not be possible if, as critics suggest, feminism derives its critical strength from universal principles of justice or human nature.<sup>8</sup> Clearly, there are many theorists who contend that the category of oppression requires a transhistorical conception of human nature both to identify oppression in particular cases and to construe such oppression as wrong.<sup>9</sup> While such a contention is not necessarily correct, it does suggest that postmodern feminists such as Nicholson and Fraser will have to do more than simply tack the virtues of feminism onto postmodernism.

In particular, they will have to accomplish two much more difficult tasks. First, they will have to develop a method for discussing gender relations as oppressive without invoking universal principles of justice

---

8. For an excellent analysis of these arguments, see A. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* (1983).

9. A vibrant debate surrounds this issue among Marxists and their critics. For an analysis of the debate itself, see J. ELSTER, *MAKING SENSE OF MARX* 220-41 (1985).

or human nature. Second, they will have to show how they can talk about women as a group without falling back on universal claims about a woman's identity. Because they do not do either of these things, they leave unanswered a variety of questions that skeptics might pose about the practical implications of postmodernism for political movements such as feminism. How, skeptics might ask, can postmodernists view women as a group once they replace the universal identities of modernism with a focus on the particular? How can they characterize particular institutions as unjust once they ground the concept of justice itself in social and political practice, rather than in a set of external evaluative criteria? How, finally, can they expect women to exercise control over their own lives — a stated goal of feminism — once they relinquish the concept of subjectivity and treat women as constructions of history?

Christine Di Stefano suggests in her contribution to the volume — “Dilemmas of Difference: Feminism, Modernity, and Postmodernism” (pp. 63-82) — that postmodernism is a theory whose time may have come for men, but not for women. Since men have had their Enlightenment, she argues, they can afford a decentered self and humility regarding the coherence and truth of their claims. But if women were to decenter their selves, they might weaken what is not yet strong. Likewise, if they were to forgo universals, they might jeopardize alliances, a politics which is not only crucial to feminism, but which itself depends on a relatively unified notion of the social subject “woman.”

Seyla Benhabib focuses in “Epistemologies of Postmodernism: A Rejoinder to Jean-François Lyotard” (pp. 107-30) on the relativism of postmodernism and its implications for feminism and other critical social and political theories. While she agrees with the postmodern critique of essentialism, she can be read as arguing that the sort of relativism embraced by Lyotard, among others, leaves only a choice between two undesirable alternatives. On the one hand, if we accept a “polytheism of values” (p. 113), we cannot talk about justice or coherently criticize the status quo. On the other hand, if we do not accept such a “polytheism of values,” we are forced to “privilege[] one domain of discourse and knowledge over others as a hidden criterion” (p.113).

While Benhabib worries that postmodernism will lead us down a relativist path, Nancy Hartsock (pp. 157-75) and Susan Bordo (pp. 133-56) worry that it will destroy the category of gender itself, a category that is absolutely crucial to feminism. If postmodernism requires abandoning cross-cultural categories, they ask, how can feminists generalize about women? And if feminists cannot generalize about women, are the only alternatives powerlessness or the politics of individual action? Both Hartsock and Bordo argue that all social the-

orizing needs a stopping point and that the stopping point for feminists can only be gender (pp. 133-45, 157-60, 170-73). Likewise, each makes clear that if feminism invokes the ideal of endless difference, either self-destruction or meaningless abstract individualism will result.

While the ideal of endless difference threatens all feminists, it especially threatens feminists who take law seriously, since law necessarily imposes on individuals a set of universal prescriptions. To be sure, some feminist legal scholars focus on difference *per se* in an effort to replace universalist claims in law with pluralist perspectives. But even these scholars acknowledge that without a universal adherence to law in general, differentiated legal treatment makes no sense in either theory or practice.<sup>10</sup>

Are postmodernists obliged to embrace an ideal of endless difference? Can they establish a stopping point in gender and acknowledge that any society which takes law seriously will have to accept generalizations about the situations in which particular individuals find themselves? Presumably, if postmodernists want to establish such a stopping point and allow for generalizations about identity, they must forgo the security of philosophy and embrace the much messier world of politics, where social generalizations are already made unconsciously on the basis of practical goals and structural limitations and where the stopping points about which Hartsock and Bordo worry are already the starting points of political argument.

Are Nicholson and Fraser willing to replace philosophy with the practical criteria of their own political movement as a way of justifying their generalizations about women? Nicholson and Fraser perceive the dangers associated with a purely philosophical postmodernism. As Nicholson writes in her introduction to the book (pp. 1-16): "The clear danger here is in viewing postmodernism as merely an invocation of certain abstract ideals, such as 'difference' rather than viewing the postmodern invocation of difference as following from and being limited to the demands of specific political contexts" (p. 10). Likewise both theorists, in their contribution, attempt to develop a postmodern analysis feminists can use to pursue political empowerment. But because they define postmodernism philosophically (p. 19), rather than politically, they are not able to demonstrate on purely political grounds how feminists might develop generalizations about women which are liberating rather than oppressive.

Presumably, if they were to begin with the practical concerns of the women's movement itself, they might be able to generalize from the situations of particular women and maintain a category of gender

---

10. For one of the most comprehensive discussions of "difference" in the legal context, see M. MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990) (reviewed in this issue by Professor Allan C. Hutchinson — Ed.)

identity without invoking universal principles of human nature. Likewise, if they were to glean principles of justice not from philosophy, but from the claims that oppressed persons themselves make, they might be able to criticize the status quo as postmodernists. What might both projects entail? Iris Young provides a possible example in *Justice and the Politics of Difference* by placing the claims of various group-based social movements at the center of her prescriptions for justice.

Young wants to develop a new way of thinking about justice in American society by shifting our attention away from considerations of neutrality to how various oppressed groups in society can be empowered. But she does not want to "construct a theory of justice" (p. 3), since she believes that to do so would reintroduce the universal claims that she as a postmodernist eschews. Young's project is contextualist and focused on the particular. She begins not with an idea of justice, but with a set of experiences shared by those who have been excluded from power in the United States — women, blacks, American Indians, gays, lesbians, and the poor. Likewise, instead of imposing external moral standards on these experiences, she sets out "to express rigorously and reflectively some of the claims about justice and injustice implicit in the politics of these movements, and to explore their meaning and implications" (p. 7).

Since most of the claims about justice and injustice that she explores involve domination and oppression, she focuses on domination and oppression in her conceptualization of justice itself. "[S]ocial justice means the elimination of institutionalized domination and oppression. Any aspect of social organization and practice relevant to domination and oppression is in principle subject to evaluation by ideals of justice" (p. 15). Presumably, her "ideals of justice" have something to do with freedom and self-expression, since freedom and self-expression generally are considered the opposites of domination and oppression. But Young does not make such a claim herself. Instead, she explores the ideals of justice in terms of their "political" manifestations and contrasts them with more purely distributive models of justice.

Young's understanding of "the political" includes virtually every form of behavior that we now recognize as political. "As I understand it," she writes, "the concept of justice coincides with the concept of the political. Politics . . . includes all aspects of institutional organization, public action, social practices and habits, and cultural meanings insofar as they potentially subject to collective evaluation and decision-making" (p. 34).

Since her general concern is with the dominated and oppressed members of our community, she focuses on those forms of politics that empower "outsiders." Likewise, she concentrates on shifting our at-

tention away from questions of material distribution to procedural issues of participation in deliberation and decisionmaking. Justice ultimately becomes a matter of political voice.

For a norm to be just, everyone who follows it must in principle have an effective voice in its consideration and be able to agree to it without coercion. For a social condition to be just, it must enable all to meet their needs and exercise their freedom; thus justice requires that all be able to express their needs. [p. 34]

Three things distinguish Young's conception of justice from other contemporary conceptions. First, it is, according to Young, much "wider" than the typical distributive model in that it "covers everything political" (p. 34). Second, it has its source not in an abstract idea of rationality, but in the politics of a group of individuals who have, according to Young, been systematically excluded from power throughout American history. Third, it is not universalist, but is based on a recognition of difference among individuals and the need for what she calls "democratic cultural pluralism" (p. 163) or the "politics of group assertion" (p. 167).

Since the definition of justice that she relies upon is essentially Hannah Pitkin's understanding of politics — "'the activity through which relatively large and permanent groups of people determine what they will collectively do, settle how they will live together, and decide their future'"<sup>11</sup> — she feels comfortable talking about the contributions that new left social movements have made to an understanding of justice by "their continuing effort to politicize vast areas of institutional, social, and cultural life in the face of forces of welfare state liberalism which operate to depoliticize public life" (p. 10). Many of these contributions concern the nature of disempowerment and how disempowerment has occurred as a consequence of the replacement of democracy with public policy formulation. Other new left contributions highlight the importance of cultural and gender differences to social justice. It is with regard to the latter group of contributions — those pertaining to "difference" — that Young makes her most interesting and original arguments.

While her efforts are generally constructive, her initial discussion of difference is critical. She concentrates on showing how liberal theories of impartiality, which posit a unified and universal point of view, oppress some social groups in practice by allowing the particular experiences and perspectives of privileged groups to parade as universal and by leading bureaucrats and experts to think that they can exercise their decisionmaking power in an impartial manner (pp. 18-33). Her arguments are persuasive and, to the extent that she extends them to

---

11. P. 9 (quoting Pitkin, *Justice: On Relating Public and Private*, 9 POL. THEORY 327, 343 (1981)).

the idea of a "civic public,"<sup>12</sup> original. She argues that while impartiality is frequently associated with theories of distributive justice, it has its counterpart in the ideal of a "civic public," an ideal which, as universalist, has operated effectively to exclude from citizenship persons identified with the body and feeling rather than with rationality — women, Jews, blacks, American Indians (pp. 96-121).

Young argues that an inclusive conception of justice that takes domination and oppression seriously will do two things. First, it will posit a vision of a heterogeneous public that itself acknowledges and affirms group difference. Second, it will challenge the liberal ideal of liberation as the elimination of group difference and replace it with an ideal that affirms group difference and fosters the inclusion and participation of all groups in public life (pp. 156-91). Young develops such an ideal herself by referring to contemporary legal debates about equality and difference in women's liberation, bilingual education, and American Indian rights. She argues that recognizing group rights is necessary to promote their full participation and that the fear of stigma now associated with differential treatment makes sense only if we understand difference as opposition — or, in other words, identify equality with sameness and difference with deviation or devaluation (pp. 168-72).

How can we avoid identifying equality with sameness and difference with deviation or devaluation? What would it mean to use group rights in the interest of full participation? Young responds to both questions by developing a principle of political decisionmaking that encourages autonomous organization of groups within a public, a principle that entails for her the establishment of procedures for ensuring that each group's voice is heard in the public through institutions of group representation. Since she is concerned about the disempowered groups in American society, she focuses on them in her discussions of group representation. Moreover, she claims that social group representation is for oppressed groups only. Justice "calls for the specific representation only of oppressed or disadvantaged groups. Privileged groups are already represented, in the sense that their voice, experience, values and priorities are already heard and acted upon" (p. 187).

Young makes clear in this context that by "group representation" she does not mean interest group liberalism, which for her rests on the conflation of interests, rather than on a shared identity. By group representation, she means the representation of "social groups," those

---

12. Young uses as her paradigm of the "civic public" Rousseau's political philosophy, which, according to her, not only posits the sovereign people as embodiments of "a universal point of view" which transcends particular interests and perspectives, but conceives of the "public realm as unified and homogenous." P. 109. Young characterizes the "civic public" in terms of such a transcendent ideal. "The civic public expresses the universal and impartial point of view of reason, standing opposed to and expelling desire, sentiment, and the particularity of needs and interests." P. 108.

"collective[s] of people who have affinity with one another because of a set of practices or way of life" (p. 186). How are these social groups to be represented? Young argues that the democratic public should provide mechanisms for the effective recognition and representation of those constituent groups that are oppressed or disadvantaged.

Such group representation itself requires (i) institutional support for the organization of group members so that they can achieve "collective empowerment" and a "reflective understanding" (p. 184) of their collective experiences and interests; (ii) "group analysis and group generation of policy proposals in institutionalized contexts where decisionmakers are obliged to show that their deliberations have taken group perspectives into consideration" (p. 184); and (iii) "group veto power regarding specific policies that affect a group directly, such as reproductive rights policy for women, or land use policy for Indian reservations" (p.184).

In this context, Young argues that present affirmative action policies place too much emphasis on distribution, and not enough on participation. She nevertheless supports these policies on the grounds that they are an important means for undermining oppression, especially oppression that results from unconscious stereotyping and presumptions about the neutrality of the privileged point of view (p. 192-221). Moreover, while she concedes that rights can be dangerous to the spirit of a community, they are necessary — in the form of "group rights" — to empower those individuals whose very existence depends on the assertion of a group identity.

While much of Young's analysis concerns group rights and group identities, her discussion of the idea of community is one of her most original contributions to the understanding of difference and inequality. Unlike other left political theorists who frequently value the ideal of community above all else,<sup>13</sup> Young argues that the ideal of community suppresses differences, since the impulse to community often coincides with a desire to preserve identity and, in practice, excludes those who threaten that sense of identity. She develops an alternative ideal of social relations and politics which begins from a "positive experience of city life" (p. 12-13), an experience that ideally embodies four virtues that represent heterogeneity rather than unity: social differentiation without exclusion, variety, eroticism, and publicity. She argues that instead of increasing local autonomy in the way that many democratic theorists now suggest, a move which would only produce more privilege and domination, we should develop a form of metropolitan regional government founded in representative institutions that begin in neighborhood assemblies (pp. 226-56).

Young's efforts to translate the political principle of difference into

---

13. The two most widely cited recent communitarian works are B. BARBER, *STRONG DEMOCRACY* (1984), and M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

practical recommendations for city life, like her discussions of affirmative action, bilingual education, and other policies of democratic cultural pluralism, are not only extremely interesting and refreshingly original, but largely successful. They illuminate the concrete conditions under which the postmodernist emphasis on difference can be translated into social and political practice. Although she does not develop a political theory of postmodernism, she goes beyond most other postmodernists by recognizing that our present theory of sameness and difference is itself political and that to transcend universality and to develop a concrete respect for cultural, gender and racial differences, we will have to start with the criteria of partisan politics, rather than with philosophy.

But what about the postmodern principle of difference itself and the conception of justice that Young builds around it? Three questions need to be addressed. First, how can democratic cultural pluralism be sustained without the very differences that Young lauds creating unequal shares of power in society? Second, how can her particular conception of justice avoid reintroducing essentialist conceptions of human nature? Third, what sorts of political arguments, if any, can be made about democratic cultural pluralism to persuade others who do not begin with her own politics?

Young's notion of democratic cultural pluralism is problematic in several respects. First, it is not clear what group representation of the oppressed and not of "the privileged" means. Who are the privileged and who are the oppressed? Young provides an excellent set of arguments in "Five Faces of Oppression" (pp. 39-65) for discerning when oppression has occurred. But the criteria of oppression that she provides — exploitation, marginalization, cultural imperialism, powerlessness, and violence — may not be interpreted similarly by all members of the community. Moreover, without an interpretive consensus, Young's entire system of justice is on shaky ground.

Second, Young does not show how a system of justice can be partially representative without those not represented dismantling the system. Because those not represented in Young's system are "the privileged," we have to wonder about the power base upon which her system of justice will rest. While Young contends that "[p]rivileged groups are already represented, in the sense that their voice, experience, values, and priorities are already heard and acted upon" (p. 187), she does not consider the difficulties that will arise when informal representation of the privileged confronts the more formal mechanisms of her own representative system. Nor does she confront the fact that many of "the privileged" will oppose those in need of formal representation and express their opposition to the system as a whole.

Third, there may not be as much agreement as Young expects within particular oppressed groups, even with regard to the group's



own identity as a group. How much consensus does there need to be about what it means to be a woman or an African-American or a homosexual? If what is needed is a broad consensus and such a consensus cannot be found, then Young's system of justice may not be as straightforwardly practical as she suggests.

Fourth, a system based on difference might end up being based on inequality, given the unequal power bases of different groups. Young tries to resist the notion that difference is necessarily connected to inequality. But she does not identify any safeguards against the devaluation of particular groups on the basis of, for example, the racial or gender identities of their members. While she is correct that difference does not automatically translate into inequality (pp. 168-72), she is overly optimistic in assuming that the devaluation of particular groups will cease in her system of justice.

The difficulties that I cite here are practical and might be overcome within Young's theoretical framework. But what about her theoretical framework itself? Young claims that her system of justice is based not on any foundational set of values or universal schema of justice, but rather on the claims that blacks, women, Hispanics, gays, and lesbians make. While this may be true, Young has organized these claims according to her own categories of domination and oppression. Where, we have to ask, do these categories come from? Do they come from social and political practice or from a more philosophical set of moral principles? Where, moreover, does the political principle of difference itself come from? Does it really derive from the needs that blacks, women, Hispanics, gays, and lesbians express, or does it have its source in a theory of the good life which itself makes particular assumptions about human nature?

Young herself recognizes a potential dilemma here that faces all postmodernists who confront justice and injustice.

Any normative theorist in the postmodern world is faced with a dilemma. On the one hand, we express and justify norms by appealing to certain values derived from a conception of the good human life. In some sense, then, any normative theory implicitly or explicitly relies on a conception of human nature. On the other hand, it would seem that we should reject the very idea of a human nature as misleading or oppressive. [p. 36; citation omitted]

Young tries to get around this dilemma by generating assumptions about human nature and the good life that are shared by all and abstract enough not to be oppressive. In this context, she does not object to abstractness as potentially oppressive, although she did in the context of her discussion of modernism. Instead, she touts abstractness as respectful to difference. "As long as the values we appeal to are abstract enough, however, they will not devalue or exclude any particular culture or way of life" (p. 37).

Young does not explain why her use of abstractness does not pres-

ent us with the difficulties associated with modernism. Nor does she defend her use of the language of commonality. Instead, she spells out the values characterizing the good life, values that include the development and exercise of one's capacities, the expression of one's experiences, and participation in the determination of one's actions. Young concedes that "[t]hese are universalist values, in the sense that they assume the equal moral worth of all persons" (p. 37). She does not, however, seem to think that such universalism is problematic.

But, she has already stipulated that universal values *are* problematic, especially when they define human nature. "Any definition of a human nature is dangerous because it threatens to devalue or exclude some acceptable individual desires, cultural characteristics, or ways of life" (p. 36). Presumably Young thinks that she has captured what all human beings actually experience, as opposed to what other theorists think that they *should* experience. Her categories are nevertheless theoretically loaded. Moreover, such loadedness is not merely academic, since she defines both oppression and domination — the foci of justice — in terms of the values of a good life.

Oppression consists in systematic institutional processes which prevent some people from learning and using satisfying and expansive skills in socially recognized settings, or institutionalized social processes which inhibit people's ability to play and communicate with others or to express their feelings . . . .

Domination consists in institutional conditions which inhibit or prevent people from participating in determining their actions or the conditions of their actions. [p. 38]

While Young's definitions of oppression and domination may indeed express the concerns of women, blacks, Hispanics, and other groups excluded from power, they clearly are based on a set of theoretical assumptions, like "equal moral worth," which smack of essentialism. Young does not need to admit that she is being essentialist if she has gleaned her definitions from social and political practice. But she does need to recognize that many of our social and political practices are themselves informed by earlier Enlightenment ideals. Such ideals were at one time construed as essentialist. While they may now be construed as mere "practical norms," we have to ask: Would they make sense in a postmodern world and, if not, how can postmodernists such as Young continue to rely on them?

Because Young does not address the Enlightenment history of her own "political norms," she does not answer this question. Nor does she address the possibility that a postmodern outlook on the world may make it difficult to convince others to accept her system of justice. She concedes at the outset that, as a postmodernist, she cannot hope to generate arguments that all rational individuals should accept, but must rather be content with speaking from her own experiences to the experiences of others.

In pursuit of a systematic theory, much philosophical writing addresses an audience made up abstractly of all reasonable persons from the point of view of any reasonable person. Because I understand critical theory as starting from a specific location in a specific society, I can claim to be neither impartial nor comprehensive. [p. 13]

Instead, she argues, she can claim only to speak about "assumptions that perhaps not all reasonable persons share" (p. 14). Because these assumptions include the assumptions "that basic equality in life situation for all persons is a moral value; that there are deep injustices in our society that can be rectified only by basic institutional changes"; and "that structures of domination wrongfully pervade our society" (p. 14), it is not clear whether Young will be able to convince those not within or sympathetic to the disempowered groups for which she claims to speak.

Although the number of people who are part of or sympathetic to these groups may be large enough to make an important difference, Young cannot assume a universal audience. Nor can she escape the dilemma that faces all postmodernists who want to be politically persuasive. On the one hand, she cannot, as a postmodernist, present her values as fundamental, but must instead construe them as part of her own politics. On the other hand, if she wants to change people's minds, she needs to be able to persuade those who do not agree with her politics to take them seriously.

While persuasiveness of this sort is not out of the question for postmodernists, they must be able to accomplish two tasks which purely philosophical postmodernists such as Lyotard and Rorty did not themselves have to recognize. The first is to find a way of generalizing about the oppression experienced by members of a particular community that can be shared by others not in the group. The second is to accommodate political judgment within their postmodernism itself. While both tasks are formidable, neither is unrealizable. Moreover, as I have suggested above, by shifting our attention away from philosophy towards politics, Young, Nicholson, Fraser, and other postmodern feminists have already moved us closer to success in their valuable contributions to postmodern political thought.

# THE CHALLENGES OF MULTIPLICITY

Jennifer Nedelsky\*

INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT. By *Elizabeth V. Spelman*. Boston: Beacon Press. 1988. Pp. xiii, 221. \$11.95.

Elizabeth Spelman<sup>1</sup> accomplishes a remarkable thing in *Inessential Woman*. She takes what has become a commonplace in feminism — that we must attend more to race and class — and transforms it into a new conception of gender to which race and class are integral. At one level the conception is not new — its essence is the basic feminist insight that gender is a social construction, not a biological phenomenon. But Spelman shows that if we take that insight seriously, attention to race and class is not an option, but a requirement of the concept of gender itself. For me, Spelman's argument thus transformed a sense of moral and political commitment to the issues of race and class into an ability to see the presence of race and class *in* gender. This transformation means that it is no longer a question of whether I will get around to doing the right thing by paying attention to these "other" issues, but whether there is integrity to my feminist projects, whether my work will be intelligible and defensible on its own terms.

Spelman's extraordinarily important contribution is to show not just that we have not acted on what we said we believed, but that we did not really know what we thought we knew — namely, how to think about gender. And she does this not by adding a perspective, such as Marxism, onto feminism, but by unpacking the requirements, insights, and methodologies of feminist theories themselves.

One might say that the core of her argument should have been obvious a long time ago. And indeed it should. It *was* obvious to women who were not part of the white middle-class audience to whom (I assume) *Inessential Woman* is primarily addressed. That this audience had not already learned the lessons Spelman teaches from, say, the available writing of women of color, is sad testimony to the privilege and blindness Spelman examines.

We — white middle-class feminists, of whom I am one — can now hear Spelman in part because she speaks our language. The book adheres to the (best) norms of academic discourse: it is carefully analytic, well argued, and clearly written (though also extending beyond

---

\* A.B. 1970, University of Rochester; A.M. 1974, University of Chicago; Ph.D. (Committee on Social Thought) 1977, University of Chicago. — Ed.

1. Associate Professor of Law and Political Science, University of Toronto.

the norms in its lively good humor). In her effective use of anecdotes from personal experience or literature, she does not simply rely on the imaginative capacity of the reader, but explicitly makes the connections to the philosophical argument. The impact of the book, however, comes not from the familiarity of its form, but the excellence of its content. Anyone who works her way carefully through the arguments will not forget their message, nor fail to change the way she sees the world and interacts with it. Spelman has this transformative power because she is not just calling for inclusion, but is engaging in the analytic work of integrating gender, race, and class.<sup>2</sup> That is difficult work, and while the core message may be familiar to many, I think her insights are likely to be useful to everyone who wants to understand the complex intersections that constitute gender.

Finally, a last introductory note to white middle-class feminists who think they already know that race and class are important and are not interested in further (guilt-inducing) instruction: I urge you to inquire into what you know and what you do. Are race and class important simply because you want to improve the lives of all women and, of course, there are women of every race and class? Spelman is saying something more than this. She is showing that we cannot understand *our* gender relations without understanding the way that the gender of whites takes its meaning in part from the way we have constructed the relation between blacks and whites, owners and workers, and the genders of subordinated groups. Similarly, we cannot understand the oppression of women of color unless we understand these interactions of the constructions of race and gender. And if your knowledge has not translated itself into action — if the importance of race and class is a belief, but not a constant part of your practice in teaching, research, and political action — then Spelman has a different kind of knowledge to impart. Spelman's insights cannot be passively absorbed.

## I

The book begins, a bit slowly I found, with chapters on Plato and Aristotle (pp. 19-56). Spelman carefully, sometimes painstakingly, unpacks the ways that each saw the gender of women differently depending on the class (such as guardians or slaves) to which the women belonged. The very meaning of "woman" — her capacities, whether or not she was subordinate to men, her relations to others — was different depending on her class. In these chapters Spelman introduces

---

2. Compare the critique that "[m]ost Anglo feminists have been more responsive to hearing the call for diversity in membership than they have been to hearing the call for the analytic inclusion of race, class and gender." Uttal, *Inclusion Without Influence: The Continuing Tokenism of Women of Color*, in *MAKING FACE, MAKING SOUL — HACIENDO CARAS: CREATIVE AND CRITICAL PERSPECTIVES BY WOMEN OF COLOR* 42 (G. Anzaldúa ed. 1990) [hereinafter *MAKING FACE, MAKING SOUL*].

two of her main points: (1) women do not simply come in different colors and classes, but there is no single meaning of "woman"; (2) we nevertheless think of these philosophers as making claims about the nature and status of women, because we take their claims about some women (those in the superior group) to be claims about all women. Spelman also uses this introduction to raise the question of "the extent to which some versions of feminism may have more of Plato in them than they [feminists] might ever have imagined" (p. 35).

Because it is a very tricky thing to transform something people already think they know (*i.e.*, that race and class are important) into a new insight, I am not sure these chapters are a good place to start. Although they are part of a careful structure of argument, I found it took too long to see the novelty and importance of the insights. To the impatient, and to those who are skeptical that this book really offers them something new, I recommend beginning with the third chapter on Simone de Beauvoir, and returning to Plato and Aristotle after they are fully engrossed with the argument.

In Chapter Three, Spelman demonstrates that even one as attuned to the issues of privilege as de Beauvoir may end up ignoring her own insights and reproducing the privilege of white middle-class women by making them the (generally unstated) focus of her inquiry. One of the most powerful of Spelman's arguments (spelled out more fully in Chapter Five) is that what appears as an obvious social-scientific technique — holding race and class constant to isolate gender oppression — not only misunderstands the nature of gender, but reinforces the privilege of white middle-class women by treating them as the paradigmatic woman. The assumption that we can best study the nature of sexism by ensuring that its objects are not also suffering from other forms of oppression (and thus confusing our findings) guarantees that white middle-class women will be the subjects of inquiry. This method of studying "sexism as such" also tacitly assumes that sexism is the same for all women, that it does not vary according to race and class — which Spelman demonstrates is not the case.

Spelman uses the contradictions in de Beauvoir to reveal how we also routinely, unthinkingly make the same moves and assumptions de Beauvoir does, and thus to argue that "we ought to think of the white middle-class privilege her work expresses, not as a personal quirk of de Beauvoir, but as part of the intellectual and political air she and many of us breathe" (p. 75). Spelman repeatedly and effectively shows how it is the nature of privilege to hide insidiously in unspoken assumptions, "common sense," and social-scientific "logic." "Privilege cannot work if it has to be noted and argued for" (p. 76).

For me the most compelling part of the book was the discussion of Nancy Chodorow's work on the reproduction of mothering.<sup>3</sup> Here

---

3. Pp. 80-113; N. CHODOROW, *THE REPRODUCTION OF MOTHERING* (1978).

Spelman argues that if we take seriously the idea that gender is a social construction, and in particular if we believe that early childhood experiences are a crucial part of that construction, then we will see that as those experiences vary by race and class the construction of gender must itself so vary. Again, Spelman reveals how Chodorow's own important insights undermine her conclusions about the relationship between gender, race, and class.

Part of what has made Chodorow's work so important for many feminists is the argument that as children learn their gender identities they learn the relations of subordination and domination intrinsic to those identities. But Spelman contends that, in a racist society, these basic lessons of hierarchy must include race-specific roles. We learn not just to be girls and boys, but to be, for example, white girls or black boys. The message to all little boys cannot be that all men are superior to all women, for this message would be very dangerous for a black mother to give to her black boy. He must learn that the complex rules of domination and subordination that are part of his gender identity are different in relation to white and black women. Thus, the hierarchy of gender cannot be, in any simple way, the model for learning other forms of hierarchy such as racial domination (as Spelman persuasively claims Chodorow suggests, pp. 88-89). Racism is embedded in the original learning of gender, not extrapolated from it.

Spelman elaborates upon the implications of all of these arguments in the remaining chapters of the book. Each new dimension to the analysis adds nuance and clarity and integrates her insights more fully into the reader's framework of thought, changing that framework in the process. While the arguments can be fairly simply stated in summary form, it takes the full depth of her analysis to give the core insights their rich originality and transformative power. My summary form thus runs the risk of making the claims seem either already familiar or unpersuasive in their novelty. I hope to have persuaded you at least of the importance of reading the book to find out if your own treatment of gender does not require an integration of race and class, or, to put it more harshly, whether that treatment unwittingly expresses the white middle-class privilege that is part of "the intellectual and political air" we breathe (p. 75). I move now from the summary to questions internal to Spelman's argument, and then to the broader challenges her argument poses.

## II

As is often the case with Spelman's arguments, her discussion of Chodorow leaves us with questions that only more research — of the kind she advocates — can answer. We often think of gender identity as one of the very earliest, pre-verbal dimensions of selfhood that chil-

dren learn. Are the dimensions of hierarchy present at the earliest stages, and if so, are all the complex intersecting forms of that hierarchy (for example class as well as race and gender) present in some primitive form? Or should we think of these dimensions of hierarchy as developing over time, in which case some particular sequences of learning might be interesting and important? Once language is present, do children of different races become conscious of racial identity at different stages? And how is the consciousness related to interpenetration of race and gender? My four-year-old is beginning to voice interest in questions of gender identity, but seems oblivious of racial differences. As far as I can tell, differences of skin color are simply one of the virtual infinity of differences with which he is confronted. He does not seem yet to have learned to attach any more significance to skin color than to hair color; indeed, I have no indication that he has ever even noticed either. Is he inattentive or indifferent to race because, as a child of the culturally dominant group, he need not learn "that the white world is dangerous and that if he does not understand its rules it may kill him"?<sup>4</sup> And is his failure to be conscious that he is white the result not only of his parents' efforts not to perpetrate racism, but also of a cultural dominance so secure that he need never encounter messages like those of the southern white parents Lillian Smith describes: "We were taught . . . to love God, to love our white skin, and to believe in the sanctity of both."<sup>5</sup>

In short, if we are to pursue the best of Chodorow's insights into the importance of early childhood experience in learning gender identity and hierarchy (as I believe Spelman intends us to), we need to know more about the mechanisms of this learning — including issues of sequence, language, and consciousness. If gender hierarchy is not the progenitor of other forms of dominance, we need to find out just how race, class, and gender intersect in the emergence of identity.

Spelman persuasively argues that, given the nature of racism in America, it is unimaginable that gender could be constructed independently of race. She thus points to the need for the kind of research I have noted just above. But, in *Inessential Woman* she does little more than provide glimpses of how, say, the gender of both blacks and whites is shaped by racism and how racism is interpenetrated by sexism. The clearest and most compelling examples come from examining the relations among black slaves and white slave owners. She helps us see how racism and slavery shaped the relation between black men and women, how "we can't understand the racism that fueled

---

4. P. 98 (quoting W. GRIER & P. COBBS, *BLACK RAGE* 61 (1968)).

5. P. 99 (quoting L. SMITH, *KILLERS OF THE DREAM* 77 (1949)). I think it is worth noting that my son grew up in Toronto, Canada. As I revise this essay in Chicago, I doubt that he would have remained unconscious of race here. In Toronto, he is routinely exposed to racial diversity, but not to the constantly simmering tensions of black-white relations that pervade Hyde Park.



white men's lynching of Black men without understanding its connection to the sexism that shaped their protective and possessive attitudes toward white women" (p. 106), and how sexism can be at work even in relations between women. Acts of racist violence by white women against black slave women "were shaped by feelings of sexual jealousy rooted in and sustained by sexism" (p. 106).

The slave examples are illuminating, but I was left wanting more details about exactly how race and gender interpenetrate in contemporary America. For example, Spelman does not explain fully how a black woman's gender is different from a white woman's. And she spends little time showing how we would see gender issues differently once we accept her point. For example, one might ask, "aren't the basic issues of feminism, such as violence against women and reproductive rights, the same for all women?"<sup>6</sup> Her book provides an important general answer: we should not assume they are the same; we should find out how, say, black women see these issues. But she does not provide the sorts of specific answers my students gave me: white women's discussions of violence against women are often laced with a tacit racism; they are shaped by an unspoken image of the assailant as a man of color. Women of color are of course concerned about violence (as prime targets of it), but they want to be sure that the approach to the problem is not shaped by the racism they commonly observe. Similarly, white women's focus on access to abortion often so neglects the practice of encouraging abortion for, and forcing sterilization on, women of color that the issue becomes unrecognizable as a common one.

Such concrete examples will enhance our understanding of Spelman's argument and of its importance. But Spelman's point is in part an analytic one, and she makes it completely persuasively: given our understanding of gender as a social construction, race must be integral to gender. The point is clearest in its negative form: What would we have to believe to continue to think it adequate simply to add race to gender, to imagine that racism and sexism function independently, and thus merely additively, for, say, black women? We would have to believe that the factors that are part of the social construction of gender — patterns of child-raising, messages about sexuality, independence or interconnectedness,<sup>7</sup> dominance, competence, physical beauty and capacity — are not significantly different for blacks and whites. The less

---

6. As my colleagues Cass Sunstein and David Strauss did ask when I summarized Spelman's arguments.

7. Chodorow's arguments have also been enormously influential through the use made of them by Carol Gilligan. C. GILLIGAN, *IN A DIFFERENT VOICE* (1982). There and elsewhere what is at stake is the argument that the different experiences of being mothered that little boys and girls have affects their different senses of themselves as basically separate or basically connected. Spelman shows that such claims, too, have to be reconsidered: "Chodorow tends to write as if the kind of care mothers provide is everywhere the same — despite her acknowledgment of the likelihood of cultural difference on this score. There is indeed no reason to presup-

analytic and more complicated point is that the meaning of sexuality that is a central part of gender identity is, for blacks and whites, defined in part in opposition to one another. Here, a detailed sense of how this works is especially important,<sup>8</sup> and Spelman offers little more than the examples from slavery. But as always, what matters here is that she shows what our task must be: if we want to understand gender, we need to find out how it is reproduced by the intersecting repressions of our society.

Spelman indirectly reveals some of the problems of pursuing this task. First, the reader will no doubt have already noticed that although I referred to race and class at the outset, most of the discussion has been about race. This imbalance reflects that of the book. I think the analytic framework is unaffected, but the imbalance reminds us of the full demands implicit in Spelman's integrative project. Not only is class a dimension of gender,<sup>9</sup> but it interacts with race, too. In paying attention to class, one must remember Spelman's arguments about why one cannot simply "add on" the dimension of race. Saying that black women suffer racism *and* sexism is true but misleading because it suggests that the racism they suffer is the same racism black men suffer and the sexism they suffer is the same sexism white women suffer. Black women suffer not only doubly, but differently. So when we try to take seriously the way class and race shape each other, and shape and are shaped by sexism, we see a problem of ever-increasing complexity unfolding before us. And of course we cannot just attend to class when we are dealing with the gender relations of those in

---

pose that what counts as 'mother's love' will not vary from culture to culture, from subgroup to subgroup" (p. 99).

8. Wendell Berry has explored the harms of racism, including the way it shapes both blacks' and whites' experience of sexuality:

A great deal has already been made by various writers of the way white men have attributed to black women the active sexuality that they did not want to see in their own women, because they did not consider sexuality to be ladylike. This is usually discussed with respect to the damage it has done to the pride of the black man and to the relationships of black men and black women. On the other side of the problem, it made the white man by turns either crude or absurdly sentimental in his relationships with the women of his own race, unable to bridge the artificial dichotomy between sex and sentiment in order to know his women as they really are. And it tended to make the white woman of the landed class in the South a functionless ornament, possessing only the powers of prettiness and charm, obsolete by the age of thirty, artificial, pretentious and silly, practicing the manners and the affectations of a world that never did exist and never could have. All that is obvious enough, and so I want only to mention it — adding, however, that the *consequences* of this sexual disorientation go far beyond the considerable unhappiness it has caused to individuals. It has poisoned the very heart of our community. It is as destructive a force as any other that we have let loose.

W. BERRY, *THE HIDDEN WOUND* 78-79 (1989).

9. The movie *Working Girl* (CBS/Fox 1988) offers an effective picture of the differences between the way gender is constructed for upper middle-class professional women and for the "working girls" who are their secretaries. Unfortunately, the gentle challenge it poses to the interpenetrating oppression of gender and class is offered in the context of reinforcing one of the lynchpins of patriarchy: the upper-class prince charming hero without whom all the heroine's efforts would have failed.

subordinated classes. As long as class, race, and gender are grounds of oppression for anyone, they intersect for everyone.<sup>10</sup>

Now the reader will probably also have noticed that even when one ensures that class does not drop out of the equation, it is still too simple. Societies systematically accord different power, privilege, and advantage on grounds of religion, ethnicity, sexual preference, and many others. Spelman periodically refers to these grounds and, in principle, analytically encompasses them. But she does spell out fully this ever-fracturing set of interconnections. Must we now abandon not only the category of women, but even categories of white or black women, to replace them with "categories" whose specificity begins to lose the character of a category at all: young, light-skinned black, female, heterosexual, bilingual, able-bodied, working-class parentage, Catholic, immigrant, urban, college-educated, unemployed, feminist, Marxist, poet?

Confronted with this specter of infinite fragmentation, we need to remind ourselves of the project with which we started. At a basic level, Spelman sets out to reveal how mainstream feminism participated in the perpetuation of white middle-class privilege and misunderstood the nature of gender in a system of race and class oppression. She seeks to understand the oppression of women as part of a complex of intersecting oppressions. Which categories are important in that complex will depend on the context. For example, in some communities in the United States, the gender of Irish Catholic working-class women is not fully understandable without attention to religion and ethnicity as well as class and race. Surely religion is also crucial for understanding the gender of Orthodox Jewish women.

These examples raise the question of whether the problem of infinite fracturing is contained by saying that not every form of diversity matters — only those that are part of a hierarchical ordering of power resulting in oppression. But I think these examples offer little hope of such containment. First, even if oppression as a Catholic or Jew is not what is most important about a woman's identity as Irish Catholic or Orthodox Jew, the basic dimensions of her gender — her sexuality, relations to men, expectations of her role as mother — and her experience of oppression on the basis of gender are not fully comprehensible

---

10. The universal quality of this claim requires comment. Spelman's examples are drawn from the United States, but she clearly intends them to apply beyond national boundaries. I think the fully nuanced version of the claim is that, in any society where race and class are grounds of oppression, one should look to see if gender is not constructed differently for different groups and to see if the construction of privilege of class and race does not have within it important rules about how men and women relate to each other. Spelman makes no claim that a system where the forms of oppression do not interact is an impossibility, just that this is hard to imagine on the basis of our experience of Western society generally, and that one should always inquire into interactions. For example, for there to be no interaction between class and gender, one would have to imagine that the privileges of class did not contain different rules for how working-class men should relate to upper-class women and to women of their own class.

in isolation from these components of her identity. Second, these examples should remind us that there are few categories of human identity that are not hierarchically ordered in North American society,<sup>11</sup> and those hierarchies accord different advantages that are often the source of oppression. Further, they help us see that identities are in large part constituted by the *multiple* intersections of hierarchically ordered categories, with the result that women may be privileged with respect to some (white middle-class) and subject to oppression with respect to others (lesbian, Jewish). Being driven to a sometimes daunting appreciation of multiplicity thus helps us avoid the mistake of simple categorization of women as either agents or objects of oppression. (Of course, this mistake can only occur after overcoming the most basic error of thinking that, as victims of sexism, women cannot be perpetrators of other forms of oppression.)

I think embracing multiplicity (rather than fearing it as a disruption of workable categories) also makes it possible to really hear the diverse stories of oppression. One of the things I was most struck by in Gloria Anzaldúa's wonderful anthology of "creative and critical perspectives by women of color"<sup>12</sup> was the expression of the particularity of the pain of oppression — from that of light-skinned black women to that of the children of mixed race growing up amid mixed and conflicting cultures. Taken as a whole, the book seeks commonality (among women of color), always in the context of attending to the full, dazzling (and threatening) array of difference.

We are left, however, with the questions of what is the basis of commonality: How do we use categories once we recognize their transformation through multiple interaction? Or, as Spelman addresses it in her final chapter: Is there any "woman" left on which to base the claims of feminism? Spelman's basic answer is that nothing in her argument undermines the theoretical or practical agenda of feminism:

[I]t is not a threat to the coherence of feminism to recognize the existence of many kinds of women, many genders. It may in fact help us to be more willing to uncover the battles among women over what "being a woman" means and about what "women's issues" are. . . . Yes, we may want and need to make a united case against a hostile world. But it is also necessary and hence a healthy sign that we battle over what that case should be, rather than relegating the making of it to the usual spokeswomen. . . . And why should we expect that women would not want and need to engage in such debates, given the recognition that gen-

---

11. And almost surely in Western societies generally. But I limit my claim (large as it is) to societies of which I have had long-term, firsthand experience. Search for an example of diversity so trivial that it has no hierarchical status accorded to it. It is hard to find one. Hair or eye color, for example, includes quite clear hierarchies. Ask the dark-haired teenage girl in California or the Asian preschooler watching Disney videos.

12. MAKING FACE, MAKING SOUL, *supra* note 2.

der is a social and political construction and given the feminist hope that women will have more and more to say about the ways their lives and the meaning of their lives are constructed and lived? [p. 176]

I find all this completely persuasive, if a trifle too rosy-sounding. Anzaldúa's anthology makes clear the pain, anger, and conflict that is entailed in working out commonality in diversity.<sup>13</sup> I can only assume that the pain and conflict entailed in developing genuine solidarity between white women and women of color is even deeper. Among other things, we must find a way of contesting categories that simultaneously permits us to listen to each other across barriers of privilege, and helps us use categories such as race and class in ways that further the dismantling of privilege, without becoming ensnared in categorical debates that deflect our energy from connection and change.

For example, who counts as white or "of color" is contested. Some Jewish women say that they are not white.<sup>14</sup> But Gloria Anzaldúa seems certain that it does not follow from this self-categorization that Jewish women are women of color:

Most of the white Jewishwomen in the class [on "U.S. Women-of-Color"] did not want to identify as white (I'm not referring to the Jewish women-of-color). Some declared they felt they "belonged" more to the women-of-color group than they did to the white group. . . . Some *mujeres-de-color* questioned the concept of "same" oppressions and claimed that all oppressions were being collapsed into one. The problem was that whitewomen and white Jewishwomen, while seeming to listen, were not really "hearing" women-of-color and could not get it into their heads that this was a space and class on and about women-of-color.<sup>15</sup>

Because we recognize that race is a socially constructed category, there can be no simple "truth" as to who is really white or "of color." We must listen hard to Anzaldúa's and her students' perception of what it means to be a woman of color and to the experiences of Jewish women and their sense of where they belong. Working through the conflict should make it clearer just how racial categories are constructed in our society, how they may be interfering with our capacities to hear one another,<sup>16</sup> and how they can best be used or deconstructed to understand and overcome oppression.

13. See, e.g., Harris & Ordoña, *Developing Unity Among Women of Color: Crossing the Barriers of Internalized Racism and Cross-Racial Hostility*, in MAKING FACE, MAKING SOUL, *supra* note 2, at 304 [hereinafter Harris & Ordoña, *Developing Unity*].

14. This issue recently arose in my class on Feminist Theory. A Jewish woman reported that in conversations about antisemitism with Jewish women friends they said, "You're not white," implying (as I heard it) that she was deluding herself by thinking of herself as white.

15. Anzaldúa, *Haciendo caras, una entrada: An Introduction*, in MAKING FACE, MAKING SOUL, *supra* note 2, at xx.

16. An example of miscommunication is my own initial misreading of the quoted statement by Anzaldúa. I thought the dispute was whether Jewish women were or were not "white." I thought that because there was disagreement over whether they were women of color, that meant that there was dispute over whether they were white — thus disputing their own self-perception. When discussing this issue with Patricia Williams, I could see that one could accept their self-

Critical self-consciousness in the use of categories is what matters. Spelman suggests that we can continue to "refer to women 'as women' or to men 'as men.' I am only insisting that whenever we do that we remember which women and which men we are thinking about" (p. 186). I think the discipline of that self-consciousness is extremely important. If we always force ourselves to add the necessary adjectives, we can better determine when it is adequate to speak only of white middle-class women, and when we must educate ourselves further so that we can make broader claims.

Finally, to recast these issues in another form: Is there no essence of womanhood? Maybe there is and maybe there isn't. All we know for sure is that we cannot possibly find out by extrapolating from the experience of white middle-class women. Spelman closes her book with some helpful guidelines about how (and how not) to go about educating ourselves adequately for any of the projects of feminism, including the questions of essentialism.

### III

In this final section, I want to move on to a brief sketch of the more general problems posed by Spelman's insights, because they are characteristic of the deep challenges that feminism raises for conventional understandings of law and theory. The celebration of difference, making diversity central to all inquiries, not only disrupts the conventional categories, but also undermines the identity among human beings that has been a presupposition of our understandings of law and politics.

Spelman's multiplicity resonates with the rejection of the traditional subject of political theory: man as a rational, autonomous being, where rationality is set in opposition to emotion and the essence of man as actor can be seen as a genuine essence shared by all. This essence abstracts from (and denigrates) the bodily dimensions of humanness, including needs, desires, and affects. While many may think they no longer accept the starkness of the Kantian rational actor (for whom affectless, rational duty is the only foundation for moral action), Kant's aspiration to achieve universality by removing contingency remains a powerful force in political theory, and perhaps even more so in law, which often relies on unexamined theoretical presuppositions.<sup>17</sup> And disembodied rationality continues to appeal as the core of an essence that can be common to all (thus universal) precisely because it excludes the contingent and the variable.

---

description as not white, and still treat as contested whether they belonged to the women of color group.

17. Given the purposes of most legal arguments, they do not include an examination of the concepts — such as selfhood, rationality, or agency — that are the underlying presuppositions necessary for the coherence, persuasiveness, or even intelligibility of the arguments.

By contrast, the feminist theory that I know characteristically insists that we cannot know the things we most need to know about people for the purposes of political theory or practice (including law) unless we treat as central their embodiedness and the affective dimensions of their lives. This is in part because our cognitive capacities do not divide up in the ways the opposition between reason and desire suggests.<sup>18</sup> But when we make embodiment and affect central, diversity immediately confronts us in all its overwhelming multiplicity. When we turn our attention to bodies and desires, we unavoidably turn our attention to the immense range of differences among us and to the contingency and variability of those differences. Diversity not only becomes the foreground in our vision, it begins to preclude perception of any background of commonality. Now this turns out to be a serious problem because of the drive for unity — the “logic of identity,” as Iris Young calls it<sup>19</sup> — that has characterized Western political thought.

Those of us educated in the dominant tradition of Western political and legal thought have assumed that we cannot think theoretically or act politically unless we can presuppose some basic identity among people. Consider, for example, the way the conventional conceptions of a structure of rights that defines and regulates the claims and obligations among people presupposes that we can think of people in some basic way as interchangeable units. In making arguments about rights we routinely make statements like, “If *A* does this to *B* then *B* has these claims against *A*. Even if we, of course, define some of the context, we must be able to leave large parts of it out so that “*A*” and “*B*” have meaning as references to all (interchangeable) people. For such sentences to make sense, we must be able to presume a high level of generality, of identity among people, so that we can immediately see that when Sue hits Harry this is an instance of the rule: “When *A* hits *B*.” But if the meaning of the encounter between Sue and Harry is discernible only by attending to the full particularity of the context, including the nuances of the relationship between Sue and Harry, then it is hard to see how there can be any rule using “*A*” and “*B*” that would be useful.<sup>20</sup>

---

18. See, e.g., Mullett, *Shifting Perspective: A New Approach to Ethics*, in *FEMINIST PERSPECTIVES: PHILOSOPHICAL ESSAYS ON METHOD AND MORALS* 109 (L. Code, S. Mullett & C. Overall eds. 1988); Young, *Impartiality and the Civic Public*, in *FEMINISM AS CRITIQUE* 57 (S. Benhabib & D. Cornell eds. 1987).

19. Young, *supra* note 18, at 57.

20. Many readers will recognize here the parallel with Carol Gilligan's description of the differences between eleven-year-old Jake and Amy's response to the question of whether Heinz should steal the drug, which he cannot afford and without which his wife will die. Jake immediately sees that the interviewer intends this as a problem solvable by general categories: life is worth more than property, so Heinz should steal the drug. Amy will not see it that way, insisting on exploring the relation among the actors to see if an accommodation can be found. Gilligan perceives the significance of the abstractions Jake uses: “Transposing a hierarchy of power into a

The full implications of the infinite regress of specificity should begin to be apparent. In the face of fracturing categories of identity, legal and political theorists must ask what provides the common ground for their characterization of people as bearers of rights. Do these characterizations in fact presuppose some *essence* (such as rational agency) as the foundation for shared rights? We begin to see (again and in new ways)<sup>21</sup> how our concepts of rights require a commonality that is in fact an identity that makes interchangeability possible.

If we accept the "inessentialness" of women (and men) for the purposes of Spelman's argument, we are confronted with a series of problems that extend far beyond her particular project: Is no generalization of either our knowledge claims or our entitlement claims possible? Am I limited to statements about my own personal experiences and those of other, specifically identified women I know of? Will even a qualifier of "white middle-class professional" be inadequate to support generalizations? Can I only ever think well about the obligations and entitlements of particular people whose circumstance I know in richly textured detail? If so, then this is the end not only of theory as we know it, but of all familiar structures of rights or rules of law.

Of course, the first move might be to dismiss the infinite regress of specificity as a silly extension of the basic insight. But I do not think it silly either in theory or in practice.<sup>22</sup> In theory, feminist demands that we make particularity, context, and diversity central, that we learn to be wary of generalization, that we pay attention to a multiplicity of voices and perspectives without assuming that they will fit into any preconceived category, indeed that we expect and welcome a disruption of categories linked to privilege — all of these demands will lead us toward specificity. At the same time, feminist theory suggests paths *through* specificity to visions of wholeness, new ways of describing patterns of connection that are true to our actual, diverse experiences.

For example, the theoretical stance I have been discussing is itself an important point of commonality, a reflection, I think, of some shared vision of the world — and thus *not* a common sense of having nothing in common. I find it very heartening that I see a deep congruence in the attention to diversity and particularity in the writings of feminists whose backgrounds, starting points, and fields are very different from one another.<sup>23</sup>

---

hierarchy of values, he defuses a potentially explosive conflict between people by casting it as an impersonal conflict of claims." C. GILLIGAN, *supra* note 7, at 32.

21. Of course arguments about the atomist, rights-bearing creatures of liberal legalism have been around for a long time.

22. Remember my argument earlier that it will not help much to try to limit the regress by attending only to those dimensions implicated in power and oppression.

23. One can see these striking convergences across even such completely different projects as Evelyn Fox Keller's exploration of how we build scientific theories, E. KELLER, *REFLECTIONS*



In practice, I see a similar impact of diversity. I see groups of feminists fracturing along the ever-finer lines of intersecting oppressions (though still primarily race, sexual orientation, language, and class). I also see an effort at genuine solidarity, a solidarity based not on a posited sameness, but on an appreciation of the full particularity of difference. The fracturing is a real problem, but the solidarity remains a real possibility. To insist that the knowledge of each other necessary for genuine solidarity must be based on attention to difference rather than posited sameness is neither to deny commonality nor to foreclose connection. It is to direct attention to what could make knowledge of commonality possible and connection real rather than illusory, equal rather than hierarchical. Because posited sameness has always had an implicit norm that finds some wanting, the insistence on difference is a source not only of fracturing, but of the possibility of a solidarity whose precondition is not compliance with hierarchical norms.

Before proceeding with my argument about the disruptive implications of (infinite) multiplicity, I want to address one obvious objection that is likely to keep occurring to the reader. It is an objection nicely captured by a *Sesame Street* segment.<sup>24</sup> The segment shows children of diverse racial and ethnic backgrounds running and playing together, and then focuses in on their different faces. The background song sings (something like): "Whoever you are, whatever you look like, underneath we are all the same. We laugh when we are happy" — the camera now shows different children doing each of these things — "we cry when we are sad, we shiver when we are cold, we sweat when we are hot." This was the egalitarian message of the 1960s and 1970s. We are really all the same; differences don't matter. Focus on sameness, for a focus on difference has been the hallmark of prejudice. It is our sameness that matters for what we really care about: mutual respect and our equal status as citizens. And this, my imagined objector would argue, is also what really matters for law and politics.

What is wrong with this objection is not that there *is* nothing we

---

ON GENDER AND SCIENCE (1985), Carol Gilligan's arguments about the forms of reasoning she calls the ethic of care, C. GILLIGAN, *supra* note 7, and Starhawk's invocation of witchcraft as a source for understanding the interconnections of the world, STARHAWK, TRUTH OR DARE: ENCOUNTERS WITH POWER, AUTHORITY, AND MYSTERY (1987). See also C. KELLER, FROM A BROKEN WEB: SEPARATION, SEXISM, AND SELF (1986); A. LORDE, SISTER OUTSIDER (1984); Harris & Ordoña, *Developing Unity*, in MAKING FACE, MAKING SOUL, *supra* note 2; Molina, *Recognizing, Accepting and Celebrating our Differences*, in MAKING FACE, MAKING SOUL, *supra* note 2, at 326. The convergent focus on diversity and particularity thus transcends arguments about whether or not there is some important commonality among us, both in the sense that it appears when that is not the subject at hand and in the sense that even those who believe in commonality treat attention to diversity as an essential means of apprehending that commonality.

24. *Sesame Street* (Children's Television Workshop, PBS). I do not mean to suggest that this is *Sesame Street's* only view on the subject of difference. They also have a very nice segment whose message is essentially the relational nature of difference.

all have in common, but what happens when we make a posited commonality the focus of our efforts at equality. I take Spelman's message to be that until we make difference our focus, we will simply presuppose a commonality without ever trying to learn about the lives, wishes, or ideas of those outside the group capable of making their presuppositions the ruling ones.

The old feminist adage "the personal is the political" is still apt in its insistence on the central importance of personal experience — in all its specificity — as the starting point of theory and practice. But of course it simultaneously insists that it is possible to see the systemic patterns in personal experience, indeed that that is the only way out of the webs of oppression in which we are trapped. Part of the problem that generated Spelman's book was the mistaken forms of generalization engaged in by white middle-class feminists: *my* personal is *the* political. Recognizing the depth and destructiveness of that error must make us take seriously the scale of the problem we confront in trying to reconstitute the meaning of "the political" and the nature of its connections to our diverse personal experiences.<sup>25</sup> Right now, the only way to avoid the imposition of the norms of the privileged is to attend to and respect difference. If we care about ending domination, we cannot afford to skip the hard and disruptive work entailed in making difference central. Whatever the long-term prognosis for finding some shared essence of persons — through knowledge of our differences and the political achievement of a shared perspective — we cannot simply posit commonality, however appealing as a sentiment or compelling as a condition for familiar forms of law and theory.

Not just the abstractions of rights but the conventional notions of deliberation rest on unity, on some basic identity that can be the foundation of shared values with respect to both process and outcomes. In Iris Young's formulation,

Impartial civilized reason characterizes the virtue of the republican man who rises above passion and desire. . . . Because virtues of impartiality and universality define the public realm, it precisely ought not to attend to our particularity. Modern normative reason and its political expression in the idea of the civic public, then, has unity and coherence by its expulsion and confinement of everything that would threaten to invade the polity with differentiation: the specificity of women's bodies and desire, the difference of race and culture, the variability of heterogeneity of

---

25. Spelman quotes K. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* vii (1956): "I have assumed that the slaves were merely ordinary human beings, that innately Negroes *are*, after all, only white men with black skins, nothing more, nothing less." Spelman adds:

[W]hite children like me . . . were told by well-meaning white adults that Black people were just like us — never, however, that we were just like Blacks. . . . Herein lies a cautionary tale for feminists who insist that underneath or beyond the differences among women there must be some shared identity — as if commonality were a metaphysical given, as if a shared viewpoint were not a difficult political achievement. [pp. 12-13]

the needs, the goals and desires of each individual, the ambiguity and changeability of feeling.<sup>26</sup>

Once multiplicity becomes central, it is no longer clear how people can talk to each other and come to collective agreement — since our models of agreement (across interests that conflict but are constrained as to what counts, what can be heard) are premised on the underlying unity of reason Young describes. When we recognize and make space for the affective dimension of communication, we not only jar the theoretical basis for the unity necessary for deliberation; practically, we let loose the anger of those excluded, further compounding the problem of communication and collective deliberation. Both our image of deliberation for the common good and the relatively smooth practice of actual deliberation (however limited as against the ideal) rest on the domination of some by others. Whether in law faculties, legislatures, or leading journals, we have established a workable unitary voice by excluding those who would speak differently, or stipulating as a requirement of their participation that they translate their voices into the dominant language. I think there is some despair in (privileged) theoretical and practical realms about what to do, how to reconstitute the conversation, when the dominance crumbles. And even those interested in dismantling the dominance share an anxiety about how to talk to each other during the process.

The problems are still more acute for adjudication. Notions of compromise or aggregation of interest as a substitute for a substantive (unitary) public good have had important (although flawed) currency in models of deliberation. But these models can be of very limited help in adjudication, where the norms of impartiality and universality (and the unity implicit in them) are at their strongest.

Our understanding of impartiality must change if the presupposition of unity is lost in taking diversity seriously. If, as I argued earlier, there are no interchangeable *As* and *Bs*, if each event is completely unique in its necessary specificity, then treating like cases alike will be of little help in achieving impartiality. And if affect is admitted as a component of reason, then we must rethink the disinterestedness that permits impartiality.

In fact, the common law might offer some assistance in this rethinking, in the form of its interesting twists on the theoretical notions of unity. For example, the common law model of the judge and two parties assumes that truth will emerge (or at least there will be fuller access to truth) from listening to different perceptions, to “both sides of the story.”<sup>27</sup> But in its current form, there are limits to the help this acknowledgment of perspective provides. First is the question of just

---

26. Young, *supra* note 18, at 67.

27. For many years now there has been commentary on the limits of a system that presumes there are *only* two sides to the story, two parties contesting, no matter how many ancillary briefs.

what the scope for difference is. To what extent must both parties cast their stories into the same framework, so that the opportunity for truly different perspectives is extremely constrained? In addition, the model is still premised on the possibility of a neutral arbiter who applies neutral rules, equally applicable to all who come before him.<sup>28</sup> And these two limitations are connected, for the competing stories must both take place in the same framework, and thus be at some basic level commensurate, comparable, in order for the judge to imagine that there is a neutral means of adjudicating between them.

An interesting complexity also arises with respect to the jury of one's peers: in the common law tradition, they should *not* be ignorant of circumstances; they should be local, have local knowledge, not mere universal knowledge. It is part of the meaning of "peers" that they are not behind a veil of ignorance. But they should be disinterested, have no stake in the outcome. This model of the jury comes close to capturing what I take to be a widely shared notion that we can recognize at least degrees of interest and disinterestedness, and that the blindness required of justice does not extend to ignorance of context or to the exclusion of the capacity to empathize. One way of posing the problem of multiplicity is asking how to recast this common-sense notion.

One might try to salvage impartiality by saying that judge, jury, and rules could at least be neutral with respect to the particular dispute and the particular parties (thus disallowing family members). But legal scholarship of the past decades has given us good reason to doubt that there are any rules (and thus any disputes) that do not carry with them the very sorts of value judgments that create heated contests *if* the values are out in the open *and* all those who had an interest in them can be heard. There must be doubts about both the rules themselves (generated almost exclusively by white, male, middle- and upper-class judges) and about the capacity of such judges to "adjudicate" fairly.

What can adjudication mean if there is not only no unity across the participants and the community at large, but if the different perspectives are in deep conflict with one another? One can only apply rules neutrally between parties if the rules are neutral between them and reflect some kind of consensus in the community. What if there is no such consensus? Or, what do we do when, at the very least, we cannot know whether there is consensus until all forums of decisionmaking are transformed by those whose voices have been silenced within them.

The embrace of multiplicity thus confronts us with pressing problems over both the long and short terms. In the long term, we may wonder whether or not any new unity may emerge, not the false

---

28. The male pronoun seems appropriate for this vision of the neutral arbiter.

unity achieved by dominance and exclusion, but a new one that incorporates rather than suppresses diversity, embodiedness, and affect. There is an important strain of reintegration in feminist theory. In these arguments the end of hierarchical oppression will make human wholeness possible by ending the arbitrary division of human capacities according to gender, race, class, and so on. And in that wholeness may be a new foundation for unity.

There are also feminist perspectives on the issue of objectivity that help us rethink the search for truth and the possibility of theory-building when difference and multiple perspectives are at the foreground of our attention.<sup>29</sup> For me, the most fascinating and helpful was Evelyn Fox Keller's discussion of the work of geneticist Barbara MacIntock.<sup>30</sup> Keller makes a persuasive case that it was MacIntock's stance of intimate connection, rather than "objective" distance, to her subject (corn plants) and her focus on difference rather than sameness that made possible her breakthroughs in genetics.

The theoretical work of feminists is helpful not only in thinking about the long-term possibility of unity, but also in confronting the rather overwhelming short-term problem of rethinking basic concepts such as deliberation, adjudication, impartiality, and disinterest. In the short term (which is the foreseeable future), we must find ways of reimagining the faculties and functions these concepts stand for *without* the presupposition of identity or unity. As long as anything like the current systems of oppression are in place, the presupposition of unity will entail dominance, for unity can only be achieved by the suppression of difference. The full implications of Spelman's arguments are thus that we need to learn to theorize, to deliberate, to make collective decisions, to resolve disputes, in new, probably time-consuming and awkward ways. We need to treat diversity as central, not incidental; we need not merely to stop suppressing the conflicts and disruptions of multiplicity, but to give up the power and privilege that has made that suppression possible.

Of course, in this book Spelman does not try to provide new conceptions of impartiality, adjudication, or deliberation. Nor have I tried to do so here. I have tried to show that if we accept Spelman's arguments, we can retain the prevailing conceptions only if we are willing to tolerate the exclusion, hierarchy, and domination implicit in their underlying assumptions of unity. Once we accept Spelman's conclusion, it will no longer do simply to say: "But I can't imagine a conception of impartiality without such unity." We must move on to the hard theoretical work of reexamining impartiality, and most of the

---

29. See particularly Sandra Harding's discussions of the conflicting feminist approaches to perspective and objectivity in Harding, *Introduction: Is There a Feminist Method?*, in *FEMINISM AND METHODOLOGY: SOCIAL SCIENCE ISSUES* 1 (S. Harding ed. 1987).

30. E. KELLER, *supra* note 23, at 158-76.

other concepts basic to legal and political theory, to see how they can be made consistent with a conception of equality rooted in difference. And we need to open up the deliberative practices we participate in so that they no longer support the privilege Spelman so effectively reveals. Her arguments do not tell us what the new institutional or theoretical forms will look like. But they move us to see that they are required.

WOMEN AND LAW IN CLASSICAL GREECE. By *Raphael Sealey*. Chapel Hill: The University of North Carolina Press. 1990. Pp. ix, 202. Cloth, \$24.95; paper, \$10.95.

Classical scholars never tire of reminding us that one must know why a document was written before one can accurately interpret it. Since most historical documents were intended to persuade, not to provide unbiased evidence for future historians, a knowledge of who was to be persuaded, and of what, can tell us whether an ancient source should be taken at face value. The same caveat should also be applied when reading modern works concerning the status of women in the ancient world. The survival of only a small amount of direct evidence makes scholarship of any aspect of ancient civilization difficult, since the scholar must of necessity make educated guesses about vital but unknown facts in order to reconstruct the society. Looking critically at the author's point of view is especially important for a topic as politically charged as the status of women.

*Women and Law in Classical Greece* presents the undisputed outlines of the legal position of women in ancient Greece. The picture drawn is bleak by modern standards. For example, in classical Athens, a woman's consent to marriage was not necessary (p. 33). A woman had no legal authority to handle transactions in property worth more than a certain minimal amount, nor could she make a will (p. 37). Throughout her life, a woman was legally under the care of a male guardian (*kyrios*) — her husband or her nearest male relative — who handled nearly all legal transactions for her, including giving her in marriage, providing a dowry, litigating on her behalf in the courts, and handling all but the smallest monetary transactions (pp. 36-38, 154). Perhaps most shocking to modern readers are the rules governing an heiress (*epikleros*), the daughter of a man who died leaving no sons. The heiress was by law given in marriage to her nearest male relative, along with the property of the deceased (p. 29). If the male relative (who might be as close in consanguinity as an uncle) was already married, he could divorce his wife and marry the heiress (p. 29). The heiress was thus treated as part of the estate and went to the heir.

Given these restrictions, classical scholars agree that the status of women in the ancient world (especially in classical Athens) was inferior to that of modern Western women. But they have long disagreed on how modern society should interpret the historical evidence. Some scholars argue that there was little connection between legal and social status, and that classical women's social status was actually much higher than a modern reading of the laws indicates.<sup>1</sup> Other scholars

---

1. See, e.g., A. GOMME, *The Position of Women in Athens in the Fifth and Fourth Centuries*

concede the circumscribed social roles of women, but interpret the evidence to show that women still in many ways led full lives.<sup>2</sup> Scholars on the other side of the debate paint a much bleaker picture of the life of women in the ancient world.<sup>3</sup> This latter perspective, recently taken up by feminist scholars, portrays Athenian women as having no political or legal rights, and a social position scarcely distinguishable from that of slaves.<sup>4</sup>

In evaluating these texts, the reader should take into account the objectives of the various scholars. Much of feminist scholarship desires to expose "the nearly universal and extraordinarily enduring character of women's oppression,"<sup>5</sup> which comes from a sexist ideology that "permeates our history and society."<sup>6</sup> Scholarship pursued to further this goal has two consequences. It may lead scholars to investigate areas traditionally ignored by classicists.<sup>7</sup> But it may also color conclusions drawn from ambiguous evidence, since scholarship showing the oppression of women as a permanent feature of Western culture lends support to feminist assumptions.<sup>8</sup>

On the other hand, the lack of an acknowledged political agenda does not mean that traditional classical scholars are free from bias. Even assuming political neutrality, one must recognize that these scholars are persons who have found ancient civilizations worthy of a lifetime of study. One would not expect to find many harsh critics of classical civilization among their numbers.<sup>9</sup>

B.C., in *ESSAYS IN GREEK HISTORY AND LITERATURE* 89 (1937). Professor Gomme gives as an example the society of the Arabian Nights, in which "women have (practically) no legal rights and are socially confined, yet are the equals of men," at least in matters of love. *Id.* at 90.

2. See, e.g., H. KITTO, *THE GREEKS* 232-35 (rev. ed. 1957) (noting that women were likely to have gone to the theater and to have received some education in the home); W. LACEY, *THE FAMILY IN CLASSICAL GREECE* 176 (1968) (Women "enjoyed a life not much narrower and not much less interesting than women in comparable classes of society elsewhere.").

3. See, e.g., Gould, *Law, Custom and Myth: Aspects of the Social Position of Women in Classical Athens*, 100 *J. HELLENIC STUD.* 38 (1980).

4. See, e.g., E. CANTARELLA, *PANDORA'S DAUGHTERS* (rev. ed. 1987); E. KEULS, *THE REIGN OF THE PHALLUS* (1985).

5. E. DuBois, G. KELLY, E. KENNEDY, C. KORSMEYER & L. ROBINSON, *FEMINIST SCHOLARSHIP* 88 (1985).

6. *Id.* at 102.

7. Consider, for example, the comprehensive study of vase paintings that give evidence regarding male Greek sexual attitudes toward women in E. KEULS, *supra* note 4.

8. Scholarship demonstrating the oppression of women in classical Athens also serves other goals. One author sees the exclusion of women's voices from public life in classical Greece as an early example of the power of speech as an instrument of domination. See Elshtain, *Feminist Discourse and Its Discontents: Language, Power, and Meaning*, in *FEMINIST THEORY: A CRITIQUE OF IDEOLOGY* 127, 130-31 (N. Keohane, M. Rosaldo & B. Gelpi eds. 1982).

9. For example, Professor Gomme's assertion that an unprejudiced reading of certain Greek poets would not reveal "anything remarkable about the position of women in Athens except perhaps the special honour paid to them," to the modern reader seems to be the product of amazingly rosy inferences drawn from the evidence. A. GOMME, *supra* note 1, at 94. Professor Keuls finds the roots of bias among traditional scholars in "the near-monopoly that men have held in the field of Classics . . . and . . . a misguided desire to protect an idealized image of



Thus, both camps — feminist and traditional scholars — consider ancient Greece to be a surrogate society for addressing contemporary issues. Traditional scholars use ancient Athens and its dazzling accomplishments as an example of the heights to which a civilized society can rise and as a model to which modern society can aspire. Feminist scholars, however, are just as determined to use Athens as a different kind of model for the modern world — a model of an opulent and cultivated society, like our own, that is ultimately based on the oppression of women. The feminists believe that tarring Athens with the same brush as modern society will better expose the faults of modern society. As expected, gaps in the historical record may be filled very differently by these groups.

Professor Sealey, a historian at the University of California at Berkeley, seems at first glance to fit into the party of traditional scholars. His earlier writings discuss ancient Greek political structures, not the status of women.<sup>10</sup> Furthermore, in this volume he takes issue with several inferences drawn by some feminist scholars (pp. 166-68), which he considers to be overstatements of the legal disabilities of women in ancient Athens. Sealey implicitly asserts that these feminist authors draw incorrect inferences because of their political biases.<sup>11</sup> On the other hand, the reader of *Women and Law in Classical Greece* will find few signs of the ancient-civilization worship characteristic of some traditional scholars. Moreover, Sealey directs his complaints against what he considers these feminist scholars' poor scholarship, not their politics. Thus, Sealey seems to occupy something of a middle ground in the debate.

That women in ancient Greece faced a variety of legal disabilities is uncontroversial. But the inferences Sealey draws from these uncontroversial facts (pp. 151-60) differ in many ways from those of both the feminist scholars and earlier traditional scholars. In comparing ancient Greek societies, Sealey finds the similarities of the laws more important than the differences. One of these similarities is that women had at least some limited legal rights.<sup>12</sup> He asserts that the legal disa-

---

Athens." E. KEULS, *supra* note 4, at 1. Professor Pomeroy asserts that the traditional scholars' admiration for the Athenians makes them "reluctant to believe that the Athenians might not have treated their wives the way cultivated gentlemen in the twentieth century treat theirs." S. POMEROY, *GODDESSES, WHORES, WIVES, AND SLAVES: WOMEN IN CLASSICAL ANTIQUITY* 59 (1975).

10. See, e.g., R. SEALEY, *THE ATHENIAN REPUBLIC: DEMOCRACY OR THE RULE OF LAW?* (1987); R. SEALEY, *A HISTORY OF THE GREEK CITY STATES, CIRCA 700-338 B.C.* (1976).

11. "A catalogue of errors soon becomes tedious, especially when they spring from a single root. Let it suffice to say that feminist indignation is out of place in the study of ancient Greece." P. 168.

12. For example, Sealey finds evidence in one Athenian forensic speech that women had the power to draw up documents to record debts and to be witnesses to legal documents. Sealey concludes that women were not always treated as passive objects, but that they had at least a rudimentary legal personality. P. 40.

bilities imposed on Greek women stem from two cultural standards common to all ancient Greek societies: women's inability under Greek customs to bear weapons and the Greeks' interest in protecting the legal status of their citizens' children. He proposes that women's inability to litigate for themselves stems from the origin of litigation as a replacement for self-help — since women were incapable of self-help without the aid of a man who could bear weapons, they were not allowed to use Greek society's replacement for self-help: litigation (p. 152). Sealey explains the lack of the need for a woman's consent to marriage as a protection to the legitimacy of citizens' children. Since Greek law severely disabled illegitimate offspring, the Greek city-state was unwilling to invalidate a marriage on such trivial (to the Greeks) grounds as the lack of consent of the parties. According to Sealey, children, and the orderly inheritance of property by children, simply mattered more to the Greeks than the legal rights of their wives (pp. 259-60). Sealey's explanations, although by no means an exoneration of the mores of the ancient Greeks, offer quite a contrast to those of Professor Keuls, a feminist scholar. She asserts that the Athenians, alone among the ancients, attempted to establish nothing less than a phallocracy — a rule of the phallus — and that the legal disabilities of women necessarily resulted from that attempt.<sup>13</sup>

Sealey reaches his conclusions after surveying the legal condition of women of several Greek cities. This survey is unusual in several respects. First, the author devotes a lengthy chapter to a comparison of the law of ancient Gortyn, a rather obscure Cretan city, with the better-known laws of the Athenians (pp. 50-81). Scholars' interest in Gortyn arises principally from the discovery in the nineteenth century of a nearly complete fifth-century legal code inscribed on a wall (p. 50). Professor Sealey's elaborate analysis of the provisions of the Gortynian Code relating to women gives crucial evidence regarding the legal condition of women of the classical period in a city other than Athens. Sealey also abandons the usual chronological approach, in which Homeric society is discussed first and Hellenistic society last. He begins by discussing the society about which most is known — ancient Athens (pp. 12-49) — and then proceeds to those about which less and less is known — Gortyn (pp. 50-81), Sparta (pp. 82-88), Hellenistic cities (pp. 89-95), and finally Homeric Greece (pp. 110-50). This device allows the narrative to flow more smoothly and puts off the most speculative conclusions until the reader has acquired a more sure foundation. The author also includes a chapter on the status of women in the Roman world (pp. 96-109), which allows the reader to make comparisons between the two cultures.

Although this is a historical study, not a legal text, much of the material discussed will seem familiar to a lawyer without classical

---

13. E. KEULS, *supra* note 4, at 1-2.

training. Sealey relies on the usual source of Athenian law: the forensic speeches of the fourth century. Because these speeches were valued as exemplars of rhetoric, not as legal documents, only one side of the case is usually preserved, and the verdict is rarely known.<sup>14</sup> The lawyer will find reading Sealey's paraphrases of these speeches similar to reading only one party's brief in a modern lawsuit. Sealey's analysis of the Code of Gortyn will also seem familiar to modern lawyers as an example of statutory interpretation.

Scholars of comparative law will be especially interested in this volume. Sealey's discussions about the legal status of women in ancient Greece inevitably lead to more general discussions about Greek law. For example, the reader learns in some detail the Greek system of property and inheritance when reading about whether women could be said to own property and whether they could devise or inherit it.

Despite this volume's considerable virtues, it suffers from two apparently conflicting vices: Professor Sealey knows both too little and too much law. As a historian, rather than a lawyer, he sometimes struggles with legal concepts and misses obvious parallels with the common law that would be illuminating to a lawyer. On the other hand, as a modern beneficiary of the 2500 years of legal development since the height of classical Greece, he knows much more law (or at least has quite a different understanding of the law) than the Greeks whom he studies.

The first criticism, that the author knows too little law, is especially relevant to legally educated readers, who would benefit from analogies to modern law. This criticism can best be illustrated by looking at Sealey's treatment of a woman's dowry in Athenian law. Customarily, the father of the bride supplied a dowry to go with his daughter upon marriage (p. 26). Since women were unable to conduct transactions for property worth more than a certain minimal value (p. 37), the husband administered the dowry (p. 26). The husband was required to return the dowry, however, if the marriage ended and the wife returned to her father's house (p. 26). Moreover, a husband's creditors could not reach his wife's dowry (p. 26). Thus, the wife can be viewed as having a property interest in the dowry, although she could not directly control it (p. 48). This concept of attenuated ownership troubles Sealey, and he spends several pages deriving and differentiating theories of "positive" and "negative" ownership, the latter of which apparently means no more than the right to exclude others from the property (pp. 47-48). Since the dowry was excluded from all except the husband, Sealey concludes that the wife had a negative ownership interest in the property (p. 48). To a lawyer, of course, the concept of ownership as a bundle of rights, one of which is the right to

---

14. See K. FREEMAN, *THE MURDER OF HERODES AND OTHER TRIALS FROM THE ATHENIAN LAW COURTS* 14-30 (1946).

exclude, is hardly novel and is certainly unworthy of lengthy explication. Furthermore, Sealey's description of the dowry is closely analogous to the common law concept of the equitable trust.<sup>15</sup> An analysis of the similarities and differences between the Greeks' use of the dowry and the equitable trust would have been helpful to lawyers.<sup>16</sup>

On the other hand, the author's detailed legal analysis can be taken as evidence that the author knows too much law, or at least has too modern a conception of legal meaning. The dowry discussion again provides a useful example. Professor Sealey's analysis of the laws pertaining to the dowry leads him to conclude that the purpose of the laws was to require the husband to administer the dowry for the wife's benefit. Such purposive analysis comes naturally even to those without legal training, so deeply embedded in the modern mind is this urge to discover the legal principles behind statutes. But such theorizing may be anachronistic in describing the Greek legal system, which lacked the conceptual framework of modern systems.<sup>17</sup> Classical Greece, unlike ancient Rome and modern America, had no legal experts. Orators such as Lysias and Demosthenes, hired by the litigants to write their speeches, were the closest equivalent; the orators, however, were experts in rhetoric, not law, and a litigant delivered the orator's speeches to the jury himself.<sup>18</sup> The jurors heard the facts and the law from the litigants and made up their minds.<sup>19</sup> The modern practice of interpretation of statutes by judges or professors (or the ancient Roman practice of interpretation by jurists) was unknown to the Greeks. Thus, neither a legal expert nor any real legal analysis stood between the Athenian code and the jury. The formal, systematic thinking about the law that we take for granted apparently did not take place in classical Athens.<sup>20</sup>

Thus, it is unlikely that the dowry laws had a single overarching purpose behind them — many contradictory purposes probably existed simultaneously, with no one controlling. No doubt a clever litigant could have argued that the purpose of the dowry statutes was to provide support for the wife. But the opposing litigant could have permuted the same or related statutes into a contradictory theory — say, that the dowry was an enticement from the woman's family to

15. According to Sealey, an Athenian woman was owner of her dowry because "[o]ther persons . . . were not allowed access to her property, but her *kyrios* [her husband or other male guardian] . . . had authority to administer her property for the specific purpose of her upkeep and the protection of her interests." P. 48. The husband seems similar to a trustee in this analysis, and the wife, an equitable owner.

16. Another parallel from the common law, equally ignored in the text, is the early English practice of entailing land given to a daughter to protect her from the unfettered discretion of her husband. See A. SIMPSON, *A HISTORY OF THE LAND LAW* 209 (2d ed. 1986).

17. See J. DAWSON, *THE ORACLES OF THE LAW* 113 (1968).

18. See K. FREEMAN, *supra* note 14, at 17-20.

19. *Id.* at 20.

20. See J. DAWSON, *supra* note 17, at 113-14.

induce the man to marry. Who was to say which theory represented the true statutory purpose? With no restraint on the jury from legal professionals who might impose an accepted interpretation or who might refuse to allow the action, the interpretation of every litigant would have a chance of being accepted by the jury. And every jury verdict would be equally valueless to the next jury. A statutory purpose is meaningless in such a system.

This modern tendency to assume that deep principles underlie statutes may be considered a bias, more subtle than the political biases discussed earlier, but similarly harmful in effect. This bias will cause a scholar to impose order where none, or little, really exists. Sealey is doubtless aware of the inherently unformed nature of classical Greek law. But because he does not take care to distinguish between Greek law and his legal analysis of it, he runs the risk of confusing the modern reader, who might suppose that his analysis is simply a rediscovery of what the Greeks themselves actually thought.

Sealey is more successful in making useful comparisons between Greek and Roman law. Since early Roman and Greek societies evolved under similar economic conditions, he believes that differences in the legal status of women must spring from something particular to the societies (p. 96). Sealey asserts that the laws of the Greeks had an underlying unity: women in ancient Greece were always under the authority of a *kyrios* (a male guardian or master). This power might be transferred from a father to a brother or other male relative, but every woman was subject to the authority of a *kyrios* throughout her life (p. 107). By contrast, male authority over women in Roman society varied from almost complete control to no more than a formal ability to ratify women's wishes, depending on the legal relationship between the man in authority and the woman under his power.<sup>21</sup>

Thus, the legal disabilities imposed by the Greeks were generally common to all Greek societies, but different from the disabilities imposed by the Romans. Professor Sealey considers this to be evidence that the disabilities imposed by the Greeks came from the common sources in Greek culture described above — women's inability to bear arms and the Greeks' overriding concern for their children's legitimacy.<sup>22</sup> By contrast, the legal disabilities of Roman women came from the patriarchal structure of Roman families, with the father wielding enormous power over all his lineal descendants, both male

---

21. For example, a daughter was subject to *patria potestas* (p. 107), which gave her father nearly unlimited power, including the power to put her to death (p. 98). But a woman who had become independent (*sui iurus*) was subject only to *tutela* — the control of her tutor (p. 107) — whose function was to give formal ratification of the woman's legal transactions (p. 105). Since in later Roman law, the woman had the power to choose her own tutor (p. 105), his control must have been very mild indeed, or she would have got rid of him. *Patria potestas* and *tutela* were both restrictions on the legal capacity of women, but they had little else in common.

22. See *supra* notes 12-13 and accompanying text.

and female. When this power was no longer threatened (for example, when the father died), the Romans more readily allowed greater liberty to children of both sexes. Thus, the power of the father in Roman society was ironically a source of some equality between the sexes (p. 158).

Overall, this book is well-written and engaging.<sup>23</sup> It is a scholarly work, however, and Sealey assumes at least a modest knowledge of classical civilization and an interest in following his close reasoning. One learns little of the general form of Athenian democracy, for example, which is important for making sense of the laws he discusses. Someone looking for a general overview of either the law or the status of women in ancient Greece will do better to look elsewhere.<sup>24</sup> Sealey is generous with his source material, giving detailed synopses of Athenian forensic speeches and the Gortynian Code. The level of detail of his analysis demands close attention from the reader, but in the end the reader is rewarded either by being more firmly persuaded or by being made fully aware of the limitations of the analysis.

Sealey has accomplished the difficult task of avoiding the excesses of both the feminist and the traditional scholars. His conclusions are well-reasoned and objective; his inferences appear to be drawn neither from a personal disdain for the Greeks' treatment of women nor from an overzealous worship of their culture. Even feminist scholars who are unpersuaded by Sealey's conclusions would do well to test their own theories against the analysis of ancient law provided in this well-written volume.

—Craig Y. Allison

---

23. I have one quibble over orthography. Sealey follows the pernicious innovation of Hellenizing the spelling of common Greek proper names which are better known to Westerners in their Latin form (e.g., Sokrates, Perikles, and Klytaimnestra). Using these less familiar spellings distracts the reader from the writing in much the same way as writing "night" phonetically as "nite." Cf. W. STRUNK & E. WHITE, *THE ELEMENTS OF STYLE* 74-75 (3d ed. 1979). It also insinuates into the mind of the lay reader the unlovely thought that the author is showing us that he knows how to read Greek.

24. See, e.g., S. POMEROY, *supra* note 9; K. FREEMAN, *supra* note 14.